Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

RICHLAND BOOKMART, INC.,
D/B/A TOWN AND COUNTRY,
Petitioner,

v.

RANDALL E. NICHOLS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Referring in the preamble of the statute to studies of secondary effects related to all adult-oriented establishments, the state of Tennessee adopted a statute regulating hours of operation requiring the closing all day on Sundays and legal holidays and from midnight until 8:00 A.M. on all other days of adult-oriented establishments. Although based on adverse secondary effects attributable to all adult establishments, the statute exempted from hours of operation adult cabarets which feature live dancing by almost nude female performers. Petitioner challenged the regulation of hours of operation as violating the First Amendment and the exemption of adult cabarets as violating equal protection of the Fourteenth Amendment. The District Court granted a preliminary injunction on first amendment grounds only and ordered the Respondent, Nichols, to show cause why the injunction should not be made permanent. Without any evidentiary hearing the District Court held the statute invalid and made the injunction permanent. The Sixth Circuit reversed and held the statute valid as not in violation of the First Amendment. It remanded for consideration of the equal protection claim. The District Court granted summary judgment for the Respondent and the Sixth Circuit affirmed that the statute did not violate equal protection.

The Questions Presented are:

1. Whether the decision should be vacated and remanded for an evidentiary hearing when Petitioner challenged the validity or lack of specific studies to justify regulations closing all adult-oriented establishments during regular daylight business hours on Sundays and holidays as well as closing from midnight to 8:00 A.M. as a violation of the First

Amendment and Petitioner was never given the opportunity to present its challenge.

2. Whether a time, place or manner regulation which relies upon secondary effects of all adult-oriented establishments may treat adult cabarets differently from all other adult-oriented establishments and exempt adult cabarets from the regulation of hours of operation without violating equal protection.

PARTIES TO THE PROCEEDINGS

Petitioner

Richland Bookmart, Inc. is a corporation authorized to do business in the state of Tennessee and has no corporate subsidiaries or a parent company.

Respondent

Randall E. Nichols is the District Attorney for Knox County, Tennessee and was sued in his official capacity.

Other Parties

Originally the City of Knoxville was sued but was dismissed by summary judgment and no appeal taken.

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PETITION FOR A WRIT OF CERTIORARI

Richland Bookmart, Inc. d/b/a Town & Country ("Petitioner") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion relative to the equal protection claim (App. A) is published at 278 F.3d 570 (*Bookmart 2).* The Sixth Circuit's order denying the rehearing and rehearing *en banc* (App. B) is unpublished. The prior Sixth Circuit Opinion relating to the First Amendment claim is published at 137 F.3d 435 (*Bookmart 1)* (App. D). The three District Court's opinions (App. C, E, and F) are unpublished.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in part as follows:

> Congress shall make no law...abridging the freedom of speech or of the press....

The Fourteenth Amendment to the United States Constitution provides in part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

to any person with in its jurisdiction the equal protection of the laws.

Chapter 421 of the Public Acts of Tennessee and the preamble to said statute are printed in the appendix (App. G). Said statute without the preamble is codified as Tennessee Code Annotated § 7-51-1401 - 1406.

JURISDICTION

The Sixth Circuit denied Petitioner's timely petition for rehearing with a suggestion for a rehearing *en banc* on March 28, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Plaintiff was never given an opportunity to present evidence to establish that the studies of secondary effects cited in the preamble did not support the State's rationale for closings on Sundays and holidays or to furnish evidence that disputes that the closing hours on Sundays and holidays or other hours would prevent crime. Petitioner filed its complaint and moved for a preliminary injunction which the District Court granted.

The District Court on its own motion ordered the Respondent, District Attorney Nichols, to show cause why the preliminary injunction should not be made permanent. The reversal by the Sixth Circuit had the effect of granting a summary judgment even though there were disputed facts for the control of hours of operation.

Petitioner attacked the statute on numerous First Amendment and equal protection grounds. The Complaint

alleged that the statute was not based upon a proper consideration of secondary effects. The Complaint stated:

> While the preamble makes certain statements, none of said evidence was presented to justify or identify secondary effects on the closing hours adopted for Sundays or holidays as well as the hours generally nor to justify other restrictions in the Act.

(See Complaint, ¶ 9(q)).

Petitioner brought suit under 42 U.S.C. § 1983 with jurisdiction also conferred for federal questions pursuant to 28 U.S.C. § 1331 that Chapter 421 of the Public Acts of 1995 of the State of Tennessee which regulated the hours of operation of adult-oriented establishments violated the First Amendment and equal protection under the Fourteenth Amendment.

Petitioner operates a video and book store in Knoxville, Tennessee. The videos are for off-premises viewing only and there are no provisions for viewing in booths or arcades as in an Adult Bookstore as defined in the Statute. Petitioner restricts access to adults only for the selling, renting and distribution of sexually-oriented books, magazines and videos. Patrons of Petitioner's business are on the premises only so long as it takes to purchase magazines or videos or rent a video.

The statute was later codified as Tennessee Code Annotated § 7-51-1401, *et seq.* and defines an adult-oriented establishment in part as:

> Any commercial establishment, business or service, or portion thereof, which offers, as its

> principal or predominant stock or trade, sexually-oriented material, devices, or paraphernalia or specified sexual activities, . . . and which restricts or purports to restrict admission to adults or to any class of adults.

Petitioner is included under the general definition of an Adult-Oriented Establishment. An "adult book store" is also defined which provides viewing by patrons of videos on the premises. "Adult cabarets" are also defined as featuring topless, go-go or exotic dancers or strippers or similar entertainers.

The statute provides that no adult-oriented establishment shall be opened before 8:00 a.m. Monday through Saturday or open after midnight Monday through Saturday. In addition, no adult establishment shall be open for business on any Sunday or legal holiday as designated by the Tennessee Code.

There is an exception, in section six that the opening and closing times limitations placed on adult establishments shall not apply to an establishment or the portion thereof which offers live entertainment in an "adult cabaret."

Adult-oriented businesses which operate on a seven day a week, twenty-four hour basis are now required to close 44.8% of the time, including all of the daylight hours on the fifty-two Sundays and eleven holidays established by the Tennessee Code. If any business was only open seven days a week from 8:00 A.M. to Midnight, the regulation would close the business 17.2% of the time.

Tennessee records its legislative history. Committee meetings and legislative sessions related to the adoption of

this Act were transcribed and filed in this proceeding. While most of the testimony in committee hearings related to the necessity to remove doors and require open booths for adult book stores providing on-premises viewing, there was testimony on hours and also discussion and debate among legislators.

There are several pertinent comments in the legislative history. At the Senate Judiciary Committee meeting of April 11, 1995, Senator Cohen asked the sponsor Senator Rice if she would explain why never on a Sunday, to which she replied:

> "Because that's the day I choose. That's a legal holiday, or not a legal holiday as such, but it is the accepted non-work day."

After some additional discussion, Senator Cohen asked, why shouldn't Tuesday be a healthy day, to which the following took place.

> Rice: Well, uh, you can choose Tuesday, I am saying Sunday and holidays.
>
> Cohen: So there's no, (unintelligible), now we're getting at, Senator, (unintelligible) there's no rational basis to this. And the same thing for legal holidays. Why Easter is a legal holiday? Right. Why Easter and not All Saints Day? Why Thanksgiving should be closed and Yule or Fourth of July?

Exhibits to Response Volume I, *Legislative History*, pp 46-47.

The statute came to the Senate floor for a vote on April 24, 1995. Senator Rice introduced Amendment No. 4 of additional "whereas" clauses to the preamble. Several Senators ask when the General Assembly and staff conducted the extensive land use study. Some commented they could not vote for the amendment because the statement that the General Assembly had conducted extensive studies was not true. It was finally suggested that the Bill be sent back to the Judiciary Committee for examination of some of the issues mentioned in the "whereas" clauses which was done. *See* Exhibits to Response, Volume I, Legislative History, pp. 55-60.

On May 9, 1995 Bruce Taylor who said he was president and chief counsel of an organization called the "National Law Center for Children and Families" and who had been with the Justice Department's Child Exploitation and Obscenity section was produced to testify about the studies and case law. Senator Cohen stated he could see the argument on night time, no people around, etc. But what about Sunday? Mr. Taylor said that there was a historical, somewhat religious, and moral community based reasons to have certain kinds of businesses closed on Sunday as opposed to any other day of the week. Senator Cohen expressed that it troubled him why the State should determine that Sunday should be a day when this type of business or any type of business should be singled out to which Mr. Taylor replied:

> "And, and I have no legal argument for that, and I have no political position. I'm not lobbying for it. I mean, that's a decision the legislature has to make. I'm not, I mean, the Court cases really don't discuss what you should do. They've only discussed what some other people have been able to do, and it is

> pretty much a local and a historical pattern of, putting restrictions on businesses that really doesn't affect the constitutionality of the law in its other respects. Therefore, it's purely a judgment that this committee or this legislature should make as to what to do on Sunday."

(Exhibits to Response, Vol. 1, Legislative History, p. 61, 87-88).

Petitioner moved for a preliminary injunction and submitted an affidavit that there were four adult cabarets in Knox County whose operating hours Monday through Saturday ended at 3:00 a.m. although some might close as early as 2:00 a.m. Sunday and holiday closing times were 2:30 a.m. although some may close as early as 2:00 a.m. The affidavit also described sixteen video stores who rented general or mainstream videos but had separate adults only sections. Eleven contained five (500) hundred or more videos portraying sexual activities in the separate room while five had several hundred. All were open and operating on Sundays.

The District Court concluded that the main battleground of the parties had been whether or not this was a permissible time, place, or manner regulation as opposed to an infringement on the freedom of speech. The Court found that the phrase "or portion thereof" and the definition of "adult-oriented establishment" permitted an argument that the separate rooms in the mainstream rental stores listed in the affidavit are subject to the closing requirements but it might be argued that the presence of such a room in a rental store renders the entire store subject to the closing hour requirements.

The District Court found the act imposes a burden so much greater than what is necessary to achieve the act's purpose to regulate the secondary effects of *establishments* like the Petitioner's. The act's closing hours far exceeded what is necessary to further Tennessee's legitimate interest in regulating the secondary effects of adult-oriented establishments. The connection between the government interest and the closing hours was tenuous. The act did not offer any explanation of why the perceived secondary effects are not also present during the hours which the adult-oriented establishments are permitted to remain open. Other federal decisions involving Tennessee regulations on hours of operation had permitted operations on all seven days of the week from 15 hours on Sunday to 19 hours during weekdays with only brief discussion of the difficulty of policing and enforcing in the wee hours of the morning.

The case did not proceed to discovery motions and ordinary procedure for a civil cause of action because the Court one month later on its own motion, issued an order for the Respondent to show cause why the Court should not enter a final judgment making the injunction permanent. District Attorney Nichols filed three bound volumes containing the legislative history. The petitioner filed an additional affidavit to establish that in the sister city of Memphis, Tennessee there were seven adult cabarets whose hours of operation from Monday through Thursday were from 11:00 a.m. until 3:00 a.m. Friday and Saturdays, the hours were from 4:00 p.m. until 6:00 a.m. the next morning and on Sundays from 4:00 p.m. until 3:00 a.m. the next morning. In addition, there were thirteen video stores in Memphis visited which all had a separate room for adults only containing anywhere from 100 to 600 adult videos. All of those stores had operating hours on Sunday.

The District Court, issued its opinion on September 26, 1996 that while the defendant Nichols had submitted *studies and other reports contained in the legislative history it* found no reason to revise its ruling and would accordingly make the injunction permanent. A judgment was entered in accordance with the order.

The Sixth Circuit in its first opinion regarding this statute ("Bookmart 1") reversed the District Court, vacated the injunction and held the act valid on its face. It in effect granted a summary judgment in favor of the Defendant Nichols without any response by the Petitioner and remanded to the District Court to consider the equal protection argument which had not been decided in the first opinion.

The Court noted the lengthy preamble adopted presumably in anticipation of expected First Amendment challenges.

The Court of Appeals determined that while the regulation is in fact content-based, it is to be "treated" like content-neutral regulations. A kind of legal fiction has been created that calls regulation of such literature "content-neutral" when what is meant is only that the regulation is constitutionally valid.

The Court of Appeals determined that under present First Amendment principles, the real question is one of reasonableness. The Court of Appeals then determined reasonableness by accepting and deferring to the studies listed in the preamble and finding that the Tennessee Legislature could reasonably rely on the experiences of other jurisdictions in restricting the hours of operation. The Court of Appeals held it was not unreasonable to believe that regulation of shops selling sex literature would tend to deter prostitution in

the neighborhood at night or the creation of drug "corners" on the surrounding streets. The Court found this was the theory and it was not unreasonable for legislators to believe it based on evidence accepted without question from other places. The Court summarily stated that the legislation leaves open alternative avenues of communication.

The Court would express no opinion on equal protection because the argument had not been fully developed and reviewed in the District Court and the case was remanded.

On remand, the Petitioner and Respondent filed motions for summary judgment. Petitioner contended strict scrutiny should be applied because the statute was treating similar establishments; that is, an adult cabaret differently from all other adult-oriented establishments. Even if a rational basis standard was used, the statute still violated equal protection. Respondent Nichols argued the rational basis standard basis should be employed which the Court applied.

The District Court relied upon an earlier Sixth Circuit decision of *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (1997) which had not found a First Amendment violation and therefore did not find any equal protection violation.

The Sixth Circuit in *Bookmart 2* affirmed the District Court in a 2 to 1 decision. Judge Clay dissented.

The majority denied the statute violated equal protection as underinclusive. It held that such a conclusion is not possible where the content of the differently regulated speech is virtually identical relying upon the reasoning in the prior Sixth Circuit decision of *DLS v. City of Chattanooga*, 107 F.3 403 (6th Cir. 1997). This is exactly the opposite of

the dissent by Judge Clay which articulates the reasons better than the Petitioner when he held the statute violates equal protection due to underinclusiveness and states as follows:

> The harmful secondary effects the Act was designed to prevent are just as likely, if not more likely, with the nonregulated live cabarets as they are with the regulated adult bookstores. Thus, the Act's exemption of the live cabarets from its operating-hour restrictions leads to the conclusion that the Tennessee Legislature has made an impermissible distinction on the basis of the content of the regulated speech.

Judge Clay recognized that the virtually identical language in *DLS* related to the difference between what expressive conduct would produce adverse secondary effects and those which would not. For example, showing nudity on cable television would come into the home where you would not have the alleged secondary effects which would occur from persons gathering at adult cabarets or adult bookstores which would both produce secondary effects.

The dissent asserted that *DLS* had expressed the principle that where the expressive content of a regulated and a nonregulated activity are the same, we must look to the secondary effects of the two activities of the establishment to determine the content-neutrality of the ordinance. Where no differences can be drawn, a conclusion of constitutional infirmity may be reached.

The majority determined that the Tennessee Legislature could implement a program of gradual reform so that there is a rational relationship to a legitimate government

purpose. The dissent notes that the respondent could not state in oral argument why secondary effects are not present with adult cabarets. The dissent asserts that common sense would indicate that, if anything, the secondary effects would be more of a concern with live cabarets. The dissent found that the majority's contention that underinclusiveness cannot be reached where the content of the speech is identical, fails to consider the significance of when the secondary effects of each are also virtually identical as espoused in *DLS*. The dissent asserts that because of the dangers posed by live cabarets not only carry the specter of dangers the Act seeks to prevent, but in fact may carry with them a greater likelihood of these dangers, he would hold the Act unconstitutional as underinclusive.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted, the judgment vacated and remanded for consideration in view of *City of Los Angeles v. Alameda Books, Inc.*

This Court granted certiorari in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. ___ (2002) and stated the reason was to clarify the standard for determining whether an ordinance serves a substantial government interest. In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the court upheld zoning regulations based upon secondary effects. In *Alameda*, the plurality said the court in *Renton* distinguished the inquiry into whether a municipal ordinance is content-neutral from the inquiry into whether it is designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. This Court in *Alameda*, determined as to the second inquiry of whether or not the regulation served a substantial government interest and did not unreasonably limit

alternative avenues of communication the inquiry asks whether the municipality can demonstrate a connection between a speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. It was only at this second stage that *Renton* contemplated that courts examine evidence concerning regulated speech and secondary effects and this Court has now established that standard of review. In discussing the evidence and the burden, this Court in *Alameda* stated that the municipality's evidence must fairly support the municipality's rationale for its ordinance. If the adult entertainment operator fails to cast direct doubt on this rationale either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*.

If the adult-oriented entertainment operator succeeds in casting doubt on the municipality's rationale in either manner, the burden shifts back to the municipality to supplement with evidence renewing support for a theory that justifies its ordinance.

The Sixth Circuit in *Bookmart I* had before it a preliminary injunction which had been made permanent in favor of Petitioner by the trial court. The Sixth Circuit did not reverse the injunction and remand for a trial to consider the challenge to the studies or finding by the State Legislature but adopted a rule that complete deference would be given to the State Legislature. If the State Legislature said it relied upon studies then whatever the State Legislature determined was binding upon the courts. Upon the theory that the studies indicated secondary effects would flow from the operation of adult-oriented establishments, a regulation limiting hours of operations would be approved if it was reasonable without

allowing an appropriate challenge by the Petitioner to the studies or rationale of the State Legislature.

Other circuits before *Alameda* considering restrictions on hours of operation have applied a similar rule. Whatever determination was made by the governmental body, it would not be reviewed by the court so long as some judicially approved precedent or study existed and the governmental body said it accepted that study. Attempts to challenge regulations as not serving a substantial governmental interest have been summarily rejected. The courts have on some occasions reviewed whether the regulations are narrowly tailored but have said the standard is lenient.

Courts have had little inclination to consider or make any determination as to whether or not the rationale asserted by municipalities or government bodies was sufficient to support either a substantial government interest or was narrowly tailored. In fact, federal courts have rejected evidence by adult-oriented establishments which disputed the factual findings of the municipality or government body.

A national expert, Bruce Taylor, a former member of the Justice Department, was produced at the legislative hearing. He could not support why there should be closing of adult-oriented establishments on Sundays except for moral reasons. The Sixth Circuit, however, noted there were studies. These studies could be accepted by the Legislature. The holding was that the Tennessee statute was valid on its face.

Petitioner had no final judgment after the decision in *Bookmart 1* and could not request review until the District Court and the Sixth Circuit had determined the remaining issue of equal protection. *Bookmart 2* was argued on August

3, 2001. This Court had taken jurisdiction of *Alameda Books* and heard argument in December, 2001. The decision by this Court on May 13, 2002 gave this Petitioner time to request this Court to grant certiorari and remand to the lower court for consideration in view of *City of Los Angeles v. Alameda Books, Inc.* This would assure that this Petitioner would have an evidentiary hearing to challenge the studies and the regulations prohibiting hours of operation.

This Court's action in *Alameda* in determining the standard for review of whether a government regulation serves a substantial governmental interest under *Renton, supra*, has the affect of invalidating most of the decisions that could be relied upon to support hours of regulations. When there have been challenges to these hours of regulations, court decisions have rejected challenges to the hours based upon erroneous standards.

An example is *SOB, Inc. v. County of Benton*, 171 F.Supp.2d, 978 (D.Minn. 2001). The District Court stated that the plaintiffs had correctly pointed out that Benton County had failed to establish more than a general concern with adverse secondary effects and that Benton County ignored evidence that nude dancing in fact had caused no local adverse secondary effects. The District Court referred to the Ninth Circuit decision in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 and noted certiorari had been granted as well as a finding by the Eleventh Circuit in *Flanigan's Enters., Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). The District Court stated:

> The concern underlying those cases, a concern the plaintiffs share, is that without a meaningful evidentiary burden local governments effectively may eliminate

> protected expression simply through a ritualistic invocation of dubious studies. Although that concern is reasonable , it again is not in accord with the rule in this circuit.

171 F.Supp.2d at 983.

The court held that the studies considered were sufficient to meet the burden under that relatively lenient standard. The Eighth Circuit had upheld adult entertainment ordinances passed in the absence of the showing of local adverse secondary effects and also held that adult entertainment ordinances had been justified by studies of secondary effects of reasonably similar businesses in other areas citing *ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413 (8th Cir. 1994).

The Seventh Circuit is even more emphatic. The governmental body only has to receive some evidence. Contradictory evidence could be disregarded. In *DiMa Corp. v. Town of Hallie,* 185 F.3d 823 (7th Cir. 1999), an adult bookstore currently opened 24 hours a day challenged the hours of regulation established in an ordinance. Under that ordinance, the adult-oriented establishment may not be open between 2:00 a.m. and 8:00 a.m. Monday through Friday, between 3:00 a.m. and 8:00 a.m. on Saturday, and between 3:00 a.m. and noon on Sunday thus requiring bookstores to close approximately 25% of the time. The court specifically noted that the adult bookstore had not created a record as to what sort of impact the limitation might have on its business, that is, how much revenue might be lost or profits affected. Without such record, it had no reason to believe the ordinance had a significant impact. However, the court rejected conflicting evidence offered by *DiMa* and stated as follows:

> In the court below, *DiMa* submitted expert testimony and a study done in Phoenix to show there is no relation between an adult-oriented business' hours of operation and crime. It also proffered various evidence showing that there was in fact no correlation between Pure Pleasure being open 24 hours a day and crime in Hallie. The District Court properly rejected this evidence because it merely contradicts other evidence that the Hallie Board could have reasonably relied upon. It is therefore irrelevant to the question of whether there is some evidence that supports the Board's conclusions. *DiMa's* contradictory evidence would be highly probative if our tasks were to discovery the objective truth about the effect of Pure Pleasure's operating in Hallie. But our task under the First Amendment is far different. The Hallie Board has the job of sorting through the available evidence and making a political judgment about what regulations best serve Hallie's interest. We are not here to judge how well the Board did its job; our task is to determine whether the law it enacted violates the Constitution. It does not.

185 F.3d at 831.

We believe the Court in *Alameda Books* has determined that it is the job of the courts to sort through the evidence and to discover the objective truth about studies and whether the regulations serve a substantial government interest or are narrowly tailored.

Schultz v. City of Cumberland, 26 F.Supp.2d 1128 (W.D. Wis. 1998) had studies and experiences from other towns introduced to show a correlation between sexually-oriented businesses and secondary effects. The evidence consist of general findings. Additionally, the City submitted an affidavit that only one police officer was on duty Sunday through Thursday and therefore restricting the number of hours would promote public safety. The District Court however agreed that the evidence did not explain why businesses may not open until 10:00 a.m. Monday through Saturday and remain closed entirely on Sunday. If it was because there was only one police officer on duty on Sunday, the ordinance permitted businesses to remain open other days of the week when only one officer was working. The court found, however, in light of the "generous standard" to which governments are held it was sufficient. The rigorous, searching inquiry suggested by the plaintiffs is inconsistent with this standard.

The Seventh Circuit, relying upon *DiMa*, affirmed in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000). The appellate court cites *Cumberland's* research that the hours of operation constraint enable local law enforcement to concentrate its limited resources for those business hours. Even though the hours of operation were fewer than in *DiMa,* the court found it was not "substantially broader than necessary even if more restrictive than absolutely necessary or justified." If the Seventh Circuit had been required to use the standard established by this Court in *Alameda*, the hours of operation should not have been upheld.

The Eleventh Circuit in *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir. 1999) made the determination that it would judge the requirement of serving a substantial government interest by reviewing the rule "as a

whole" and would not look to the city's reasons for some particular regulation.

The court found the hours of operation was a close question. The plaintiffs had limited their argument as to why adult-oriented establishments needed to be closed from 10:00 a.m. until noon every day as required by the regulation. The city at oral argument admitted it could come up with no reason requiring closure between 10:00 a.m. and noon. The court could not either. The court said the question was whether it needed a reason. It found it did not. It would consider the operation rule as a whole and would not confuse the requirement that a regulation serve a substantial government interest with the requirement that it be narrowly tailored to that end. It declined to scrutinize the city's reasons for this rule which would be its rationale. The court refused to enter into any type of line drawing. This is not line drawing but a substantial challenge which deserves to be heard that the requirement of closing during normal daylight business hours does not satisfy any substantial government interest.

The Court should grant certiorari, vacate and remand for consideration in view of *Alameda*. The Petitioner will challenge the studies relied on by the State, introduce evidence to refute the studies and litigate any additional evidence introduced to refute the regulation of hours established in the statute.

2. The question presented on equal protection is important.

The decision below, *Bookmart 2*, extends for the first time a ruling that a time, place or manner regulation can classify adult cabarets differently from all other adult-oriented

establishments regardless of the fact that all of said establishments allegedly produce the same adverse secondary effects. This extension will permit municipalities and States to adopt many more regulations which may discriminate between various types of adult entertainment. The accepted basis under the First Amendment for such time, place or manner regulations is that the adult entertainment establishments produce secondary effects which are not produced by regular entertainment facilities. The municipalities or States will now be able to distinguish between similar activities that both produce adverse secondary effects and avoid the strict scrutiny required when dealing with similar situated activities.

This Court has regularly rejected any equal protection argument in dealing with First Amendment activities that may be "treated" as content-neutral because the activities produce the same kinds of secondary effects.

The secondary effects usually identified are reducing crime, sexual acts or solicitation of sex, preserving the aesthetic esthetic character of the neighborhood or preventing urban blight. The right to classify one adult establishment different from another adult establishment regardless of the fact that each may produce the same or similar adverse secondary effects will eliminate the use of strict scrutiny.

This Court has held on several occasions that if the classification based upon secondary effects does not violate the First Amendment, it likewise would not violate equal protection.

In the seminal case of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the court determined that even though the First

Amendment protects communication from total suppression, a state may legitimately use the content of these materials as a basis for placing them in a different classification from other motion picture theaters. The city's interest in the present and future character of its neighborhoods adequately supported the classification of motion pictures so that the zoning ordinances did not violate the equal protection clause of the Fourteenth Amendment.

Again, in *City of Renton v. Playtime Theatres, Inc.*, 575 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the *Renton* ordinance "treated" theaters that specialize in adult films differently from other kinds of theaters. The ordinance was narrowly tailored to affect only that category of theaters shown to produce the unwanted secondary effects.

The Court rejected any violation of the equal protection clause as it was apparent that the adult theater could fair no better under the equal protection clause than under the First Amendment itself.

This Court again reaffirmed the right to treat adult cabarets differently from regular entertainment in *City of Erie v. Pap's, A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000). In *Pap's*, the court recited again that in *Renton* the regulation explicitly treated the adult movie theaters differently from other theaters and defined adult theaters solely by reference to the content of the movies. The court said it nevertheless treated the zoning regulation as content-neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves.

The regulation of adult-oriented establishments is justified solely by the adverse secondary effects which they

produce. However, the Tennessee Act has been held not to violate the equal protection clause of the Fourteenth Amendment although it permits Adult Cabarets to be treated and classified differently from all other adult-oriented establishments so as to exempt Adult Cabarets from the hours of operation. As a result, Adult Cabarets can be open until 3:00 a.m. or later in the morning and can be open on Sundays and holidays. All other adult-oriented establishments must close during normal business hours on Sundays and holidays and also must close between midnight and 8:00 a.m. Monday through Saturday.

If this principle is permitted to stand, then the scores of regulations of adult entertainment may now be expanded so as to classify one adult use different from another.

There should be permitted no classification of one adult-oriented establishment differently from another adult-oriented establishment where both are offering entertainment protected by the First Amendment and where both allegedly produce similar adverse secondary effects. All of the cases and studies referred to in the preamble of the Tennessee legislation assert that all adult-oriented establishments produce secondary effects and therefore are subject to regulation. The regulations, although based upon content, are to be treated as content-neutral because the regulations seek to regulate the secondary effects of speech and not the speech itself.

The secondary effects argument is the only basis by which the regulations of adult-oriented establishments can survive First Amendment challenge. The regulations are for a substantial government interest and must be narrowly tailored. It is on the regulation of the secondary effects and not the content by which the regulations survive. *Renton* found the zoning regulations did not contravene the

fundamental principles that underlie concerns about content-based speech because the stated purpose of the regulations is to curb the secondary effects of the adult-oriented establishments. The regulation is to affect only those category of establishments that produce the unwanted secondary effects. This Court has found the secondary effects can be caused by the presence of even one such adult establishment in a neighborhood. See, *City of Erie v. Pap's*, 120 S.Ct. at 1392.

The reported decisions which uphold hours of operations do not have a challenge to equal protection or else have rejected the equal protection argument because all adult entertainment is classified differently from regular entertainment. The regulations of hours apply to all entertainment establishments. See, *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 10 F.3d 123 (3rd Cir. 1993), *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155 (3rd Cir. 1997), *DiMa Corporation v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *Ellwest Stereo Theater, Inc. v. Boner*, 718 F.Supp. 1553 (M.D. Tenn. 1989), *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986).

In the hours of operation case of *National Amusements, Inc. v. Town of Dedham,* 43 F.3d 731 (1st Cir. 1995) there had been an exception to the regulation of hours for ballroom dancing. However, the attorney general refused to sanction this exception as not being content-neutral. It could therefore be considered an equal protection violation which was eliminated. Finally, in the District Court opinion of *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F.Supp. 1428 (M.D. Fla. 1997), there was an exception to the hours of operation for city-owned facilities. The District Court found this violated equal protection and the city did not appeal

the severance of this provision from the ordinance. The Court found that the relevant question was whether adult entertainment may lead to the undesired secondary effects and the fact that the property was city owned which would be rented did not eliminate the possibility of secondary effects.

While these district court decisions hold a violation of equal protection because of the attempted classification of similarly situated adult establishments, the decision in *Bookmart 2* would allow expressive content which is virtually identical to be classified and not violate equal protection.

Without this Court's determination that similarly situated adult establishments cannot be classified differently without being tested by strict scrutiny, the door would be open for different regulations of various adult-oriented establishments which could ignore the principles of equal protection.

3. The decision of the Court of Appeals on Equal Protection is wrong.

There is no justification under either rational or strict scrutiny for the classification of one adult-oriented establishment differently from another adult-oriented establishment where both are offering entertainment protection by the First Amendment and where both allegedly produce similar adverse secondary effects. The classification of an adult entertainment establishment differently from a traditional entertainment establishment has been recognized. However, the attempt to classify adult cabarets differently from all other adult entertainment establishments must fail. The rationale of adverse secondary effects to reduce crime, prostitution, sexual offenses, blight or downgrading of neighborhood property applies just the same to adult cabarets

as to all other regulated adult-oriented entertainment and there can be no distinctive treatment. All of these adult entertainment establishments are similarly situated for regulation of hours. The Equal Protection Clause protects against arbitrary classification and requires that similarly situated persons be treated equally. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

The preamble to the legislation, the testimony in the legislative history, and the decisions of courts listed in the preamble as well as courts generally establish that secondary effects of adult entertainment applied to all forms of adult entertainment. None make a distinction that adult cabarets have less adverse secondary effects or should be treated differently from other adult establishments.

The stated purpose in the Act for hours of regulations is the secondary effects of all adult-oriented establishments. This Court had stated that an Act can meet the requirements of the Equal Protection Clause if the classification furthers the purpose identified by the state in the statute. See, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 at 314, 96 S.Ct. 2562 at 2567. This Court in *Board of Trustees of the University of Alabama v. Garrett*, ___ U.S. ___, 121 S.Ct. 955 (2000) cites *Murgia* as an unremarkable and widely acknowledged tenet of this Court's equal protection jurisprudence that state action subject to rational-basis security does not violate the Fourteenth Amendment when it rationally furthers the purpose identified by the state. The purpose identified by the state of Tennessee in the preamble is the control of secondary effects of all adult-oriented establishments. There can be no speculation that the Tennessee Legislature intended to consider a classification

different for adult cabarets based upon a medium of expression.

The Court must begin its inquiry by examining the statute itself and its legislative history. As long as the purposes of the statute can be easily ascertained from these sources, this Court should limit its inquiry to them. See, *Consolidated Edison of New York v. Pataki*, 117 F.Supp.2d 257 (N.D. NY 2000). Our Tennessee Federal District Courts have cited the same rule. The mere assertion of a legitimate government interest has never been enough to validate a law. The Court must evaluate the relationship between the law and the stated purpose thereof. See, *Craigmiles v. Giles*, 110 F.Supp.2d 658 (E.D. Tenn. 2000).

A misguided statement by the majority of the Court of Appeals that the State had eliminated nudity in adult cabarets and wanted to see the result does not jive with the stated purpose of the Act in its preamble. Nor is there any such assertion in the legislative history. If the Tennessee Legislature wanted to know the result of eliminating nudity, they could have looked to determine what had happened in the state of Indiana since the decision in 1991 of *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Of course, there have been dozens of decisions in various circuits that have followed *Barnes* and eliminated nudity that could have been studied. The Tennessee Legislature could not assume that the Act was not being enforced. In fact, the District Court in Nashville had denied the preliminary injunction and it was not until an appeal was decided in the Sixth Circuit in January, 1996 (8 months after the Adult-Oriented Establishment Act of 1995 had been passed) that a preliminary injunction was granted against the enforcement of the Public Indecency Statute.

The dissent correctly determined that the law was unconstitutional under the Equal Protection Clause due to its underinclusiveness. The dissent correctly states that the harmful secondary effects the Act was designed to prevent are just as likely, if not more likely, with a non-regulated live cabarets as they are with the regulated adult book stores.

This Court in *City of Renton v. Playtimes, Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986) referred to the *Renton* ordinance as underinclusive. It failed to regulate other kinds of adult businesses that are likely to produce secondary effects. However, on the record, the Court said the contention must fail since there were no other adult businesses located in *Renton* and no basis to assume that *Renton* will not in the future amend its ordinance to include other kinds of businesses that have been shown to produce the same kinds of secondary effects as adult theaters. In Tennessee, not only was the legislative history directed to all adult-oriented establishments which included adult cabarets, but there had been a history of litigation in Nashville, Knoxville, Chattanooga and Memphis in reported federal decisions involving adult cabarets and adverse secondary effects. There is absolutely no basis for which the Court could conclude that the Tennessee Legislature intended to adopt a step by step reform. In fact, there is nothing to indicate how this exemption came to be in the Act and nothing ever stated to justify the exemption.

The body of case law applying legislative restrictions to adult entertainment establishments relies on adverse secondary effects that debase adjacent properties. See for example, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382. The classification of expressing material based upon content only survives both First Amendment and equal protection challenge from the decision of this Court in *Young*

forward because it is based upon the secondary effects doctrine. The State of New York in *Stringfellows of New York Ltd. v. City of New York*, 694 N.E.2d 407 (N.Y. Ct. App. 1998) correctly noted that its planning commission had found that all of the adult uses that would be covered by the proposed zoning regulations had been shown to produce secondary effects and more importantly that nothing in the studies or in the public testimony justifies distinctive treatment of any adult use.

The dangers posed by live cabarets not only carry the specter of dangers of adverse secondary effects that the Act seeks to prevent but in fact carry a greater likelihood of those dangers because of the possible contact between patrons and dancers. There is therefore no possible basis, rational or otherwise, to exempt adult cabarets from hours of operation and the Tennessee Act violates the Equal Protection Clause.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted or, in the alternative, granted, the judgment vacated and remanded for consideration in view of *City of Los Angeles v. Alameda Books*.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5563

[Filed January 23, 2002]

RICHLAND BOOKMART, INC., d/b/a TOWN AND COUNTRY,	)
Plaintiff-Appellant,	)
v.	)
RANDALL E. NICHOLS,	)
Defendant-Appellee.	)

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville
No. 95-00349
R. Leon Jordan, District Judge

JUDGES:
Before CLAY and GILMAN, Circuit Judges; WISEMAN,

Senior District Judge.* GILMAN, J., delivered the opinion of the court, in which WISEMAN, D. J., joined. CLAY, J., delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. In 1995, Richland Bookmart, Inc. (Bookmart), the operator of an adult-oriented video and book store, brought suit against Randall E. Nichols, the District Attorney for Knox County, Tennessee, challenging Tennessee's Adult-Oriented Establishments Act of 1995 (the Act) on the grounds that it violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Act requires that all adult-oriented establishments be closed on Sundays and state holidays, restricts the hours of operation for certain of these establishments, and mandates that all of them remove doors or other obstructions from the booths in which patrons watch sexually-explicit videos or live entertainment.

Concluding that the operating-hour restrictions violated the First Amendment and that the Act was unconstitutionally vague and overbroad, the district court issued a permanent injunction to enjoin enforcement of the Act. On appeal, this court reversed the district court's conclusion that the Act violated the First Amendment, and remanded the case for further proceedings to consider Bookmart's equal protection argument under the Fourteenth

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* The Honorable Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

Amendment. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998) (*Bookmart I*).

Both parties subsequently filed motions for summary judgment. In denying Bookmart's equal protection challenge, the district court concluded that the exclusion of live-entertainment establishments from the time restrictions of the Act was rationally related to Tennessee's legitimate interest in combating the harmful secondary effects of such establishments through a step-by-step legislative reform effort. Bookmart now challenges that ruling. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

Bookmart operates a video and book store in Knoxville, Tennessee. Restricting access to adults only, it sells, rents, and distributes sexually oriented books, magazines, and videos. The videos are for off-premises viewing only.

In May of 1995, the Tennessee legislature passed the Adult-Oriented Establishments Act of 1995, Tenn. Code Ann. § 7-51-1401. The Act defines an "adult-oriented establishment" as "any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominant stock or trade, sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults." Such

establishments include adult bookstores, adult motion picture theaters, and adult live entertainment.

Section 3 of the Act limits the business hours for adult-oriented establishments to between 8:00 a.m. and 12:00 a.m., Monday through Saturday. It also prohibits all such establishments from operating on Sundays and state legal holidays. Section 4 of the Act regulates the configuration of private booths, stalls, or partitioned rooms in order to prevent their use for sexual activity. Because Bookmart has no private booths, this provision of the Act is not at issue. Section 5 of the Act sets out the criminal penalties, making any violation a misdemeanor.

The basis for Bookmart's equal protection challenge is found in Section 6 of the Act. Here, the Act specifically exempts adult-oriented establishments offering "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting" (collectively "live cabarets") from its "opening and closing time limitations." Bookmart maintains that the Act, therefore, classifies similarly situated adult-oriented establishments differently.

Anticipating constitutional challenges, the Tennessee legislature held significant hearings and included a lengthy preamble in the Act. The Act's preamble and legislative history make clear that the legislature promulgated the Act in order to address certain adverse secondary effects commonly associated with adult-oriented establishments. These secondary effects include increased crime and prostitution, reduced property values, urban blight, the spread of sexually transmitted and communicable diseases, and an overall downturn in the quality of life.

Because the Tennessee legislature focused its attention on potential First Amendment challenges to the Act, there are few references in the legislative history to equal protection or to the rationale supporting the operating-hour exemption for live cabarets provided in Section 6. In the prior year, however, the legislature had passed Tennessee's Public Indecency Act, Tenn. Code Ann. § 39-13-511, making it a misdemeanor offense to knowingly or intentionally appear in public in a "state of nudity." To comply with the indecency statute, performers at the live cabarets have to wear, at a minimum, "pasties" and a "G-string."

The indecency statute, like the Act before us, was enacted to further the state's interest in combating the harmful secondary effects associated with adult-oriented establishments. Its preamble states that "nude dancing establishments, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values" and "contributing to urban blight and downgrading the quality of life in the adjacent area."

Before the indecency law went into effect in July of 1994, multiple owners and operators of nude dancing establishments brought suit, challenging the law's constitutionality under the First Amendment. Enforcement of the law was stayed pending the outcome of these lawsuits. In January of 1999, this court upheld the Public Indecency Act, concluding that its enforcement does not violate the First Amendment's guarantee of freedom of expression. *See In re: Tennessee Pub. Indecency Statute*, 1999 U.S. App. LEXIS 535, Nos. 96-6512, 96-6573, 97-5924, 97-5938, 1999 WL

55276, at *3 (6th Cir. Jan. 13, 1999) (unpublished table decision). Because of the delay in implementation caused by the pending litigation, the Tennessee legislature was not able to assess the Public Indecency Act's efficacy in combating the secondary effects associated with nude dancing establishments when it was considering the Adult-Oriented Establishments Act in 1995.

B. Procedural history

One month after the Adult-Oriented Establishments Act was passed, Bookmart initiated suit, seeking to enjoin its enforcement as a violation of both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The district court concluded that the Act's operating-hour restrictions violated the First Amendment, and that the Act was unconstitutional in its overbreadth and vagueness. It therefore issued a preliminary injunction that was later made permanent. The district court, however, never reached the equal protection issue raised in Bookmart's complaint.

This court reversed the district court on appeal and upheld the Act as constitutional under the First Amendment. The court reasoned:

> Such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug "corners" on the surrounding streets. By deterring such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store fronts, a blighted appearance and the lowering of the property

> values of homes and shopping areas. Such regulation may prevent the bombed-out, boarded-up look of areas invaded by such establishments.

Bookmart I, 137 F.3d at 440-41. It therefore vacated the permanent injunction and remanded the case to the district court for further proceedings on Bookmart's equal protection challenge to the Act's exemption of live cabarets from the operating-hour restrictions.

On remand, Bookmart moved for a preliminary injunction and for summary judgment. The District Attorney opposed Bookmart's motions and filed his own motion for judgment on the pleadings or, in the alternative, summary judgment. Because both parties agreed at a status conference to maintain the status quo, the district court denied as moot Bookmart's motion for a preliminary injunction.

The district court granted the District Attorney's motion for summary judgment on March 31, 2000. The court rejected Bookmart's equal protection challenge, finding that the Tennessee legislature had rationally chosen to mount a step-by-step approach in its efforts to ameliorate the secondary effects of adult-oriented establishments. Bookmart now brings the instant appeal.

II. ANALYSIS

A. Level of scrutiny

The Equal Protection Clause protects against arbitrary classifications, and requires that similarly situated persons be

treated equally. *See* U.S. Const. Amend. XIV; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). To withstand Fourteenth Amendment scrutiny, statutes that do not interfere with fundamental rights or single out suspect classifications must bear only a rational relationship to a legitimate state interest. *See City of Cleburne*, 473 U.S. at 440.

Because adult-bookstore owners are obviously not a suspect class entitled to heightened protection, the remaining question for determining the proper level of scrutiny is whether the Act's operating-hour restrictions implicate any fundamental right. Bookmart contends that the Act should be subject to strict scrutiny analysis because it burdens the fundamental rights associated with freedom of expression and is a content-based regulation in violation of the First Amendment. The District Attorney, on the other hand, maintains that we need apply only the rational basis test in our analysis.

In upholding the constitutionality of the statute under the First Amendment in *Bookmart I*, this court concluded that because the Act targeted the secondary effects of adult-oriented establishments rather than their expressive content, it was to be treated as content-neutral as between sexually-explicit and non-sexually explicit speech. *Bookmart I*, however, did not reach the question of whether the Act discriminates between different types of adult establishments based upon the content of their expression. The finding of content-neutrality, therefore, does not foreclose Bookmart's argument that its equal protection claim implicates fundamental First Amendment rights.

According to Bookmart, the Act is underinclusive in a way that reveals its intentional content-based discrimination against adult bookstores versus live cabarets. The underinclusiveness of a law will violate the First Amendment where the proof establishes that the statute in question is intended to restrict disfavored expressive content while exempting the expression of favored content. *City of Ladue v. Gilleo*, 512 U.S. 43, 51, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994) (holding that an exemption might violate the First Amendment if it represents "a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people"). Although in some cases the First Amendment is violated because "the underinclusiveness of a law--i.e., the failure of the government to regulate other, similar activity--may give rise to a conclusion that the government has in fact made an impermissible distinction on the basis of the content of the regulated speech," such a conclusion is not possible where the content of the differently regulated speech is "virtually identical." *DLS v. City of Chattanooga*, 107 F.3d 403, 412 n.7 (6th Cir. 1997) (holding, in rejecting a similar underinclusiveness challenge, that a statute regulating live cabarets differently than other forms of adult entertainment was not content-based because the content of the differently regulated modes of expression was "virtually identical").

Bookmart's equal protection claim does not implicate fundamental First Amendment rights because Bookmart offers no evidence that the expressive content of live cabarets is different in any meaningful respect from that of the adult bookstores subject to the operating-hour restrictions imposed by the Act. Because the expressive content of the regulated live cabarets is "virtually identical" to that of adult

bookstores, the statute cannot be said to discriminate against the expressive content of the bookstores and in favor of that of the live cabarets. *DLS*, 107 F.3d at 411.

To support the argument that we should infer content-based discrimination from the fact that the secondary effects of the live cabarets and adult bookstores are the same, the dissent relies upon a single clause found in *DLS* to the effect that none of the unregulated activities identified by DLS "carries with it the same danger of crime and disease that adult cabarets do." *Id.* at 411. Unlike the dissent, however, we do not believe that the outcome in *DLS* turned on this point, nor do we believe that the absence of such a distinction absolves Bookmart from its burden of proving invidious discrimination as discussed in Part B below.

This court in *DLS* considered an underinclusiveness claim similar to the one raised by Bookmart. At issue was a city ordinance prohibiting entertainers at adult-oriented establishments from approaching within six feet of customers, employees, or other entertainers during a performance. The ordinance was upheld despite the city's failure to apply any comparable restrictions to speech with "virtually identical" expressive content, such as nudity on cable television. *DLS*, 107 F.3d at 411. As the dissent points out, the *DLS* court noted that the state's "secondary effects" rationale for the statute's disparate treatment of live cabarets versus adult cable television was supported by the fact that the content of the two forms of expression was the same, but the secondary effects were different. *DLS*, 107 F.3d at 411.

In the present case, the state's non-discriminatory rationale in support of the Act's operating-hour restrictions

would indeed be bolstered if, as in *DLS*, the disparate treatment of adult cabarets and adult bookstores could be ascribed directly to a difference in the secondary effects of the two types of establishments. The fact that the secondary effects are the same, however, does not *ipso facto* establish that the difference in treatment is the result of content-based discrimination. Instead, the Tennessee legislature apparently differentiated between the various adult-oriented establishments based on their *medium* of expression rather than the *content* of their expression simply because the legislature had dealt with the secondary effects of live cabarets the year before and turned to bookstores the following year. *See Ripplinger v. Collins*, 868 F.2d 1043, 1050-51 (9th Cir. 1989) (holding that Arizona's obscenity statute, which provided an exemption for cable television operators but not booksellers, did not violate the Equal Protection Clause). We therefore disagree with the inference that the dissent draws from the *DLS* case to the effect that where the secondary effects of two types of differently regulated adult entertainment are the same, it follows that the statute discriminates based upon expressive content. Such an inference is inconsistent with the uncontested fact that the expressive content of the live cabarets and adult bookstores is virtually identical.

The Act will therefore survive an equal protection challenge if it has a rational basis. Under the rational basis standard, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Nguyen v. I.N.S.*, 150 L. Ed. 2d 115, 121 S. Ct. 2053, 2068 (2001).

B. The Act is rationally related to a legitimate governmental interest

The essence of Bookmart's equal protection claim is that the Act should be held unconstitutional because it is underinclusive. Bookmart claims that the Act's exemption of live cabarets from these restrictions is irrational because the Tennessee legislature determined that the secondary effects of live cabarets are indistinguishable from those of adult bookstores. This being the case, the legislative goal of combating the harmful secondary effects of adult-oriented establishments cannot explain the difference in treatment between adult cabarets and adult bookstores.

The problem with this argument, however, is that an exemption will rarely, if ever, invalidate a statute, unless the distinction created by the exemption is the result of invidious discrimination. *See Kucharek v. Hanaway*, 902 F.2d 513, 520 (7th Cir. 1990) ("The existence of an exemption will rarely if ever invalidate a statute unless the distinction created by it is invidious--say a head tax from which Christians are exempt.").

As the Supreme Court explained in *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955):

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take

> one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 489 (internal citations omitted).

The Supreme Court has determined that invidiousness is present when a legislature is motivated by a discriminatory or impermissible intent when creating the challenged classification. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 276-80, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) (rejecting an equal protection challenge to the state's hiring preference for veterans because there was no finding that the law's purpose was to intentionally discriminate against women); *Washington v. Davis*, 426 U.S. 229, 238-48, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976) (holding that the police department's written personnel test did not run afoul of the Equal Protection Clause despite its racially disproportionate impact because the requirement was not prompted by an invidious motive); *cf. Griffin v. Illinois*, 351 U.S. 12, 18-19, 100 L. Ed. 891, 76 S. Ct. 585 (1956) (holding that the de facto denial of appeal rights by an Illinois statute that required payment for a trial transcript denied equal protection to indigents because it invidiously discriminated among defendants based upon their wealth).

In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993), the

Court elaborated on the meaning of "invidious discrimination" by looking at the definition and the context in which it was used in *Griffin*. The Court cited with approval the dictionary definition of the term "invidious" as "tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." *Id.* (citing Webster's Second International Dictionary 1306 (1954)) (brackets in original). In the present case, Bookmart does not even allege, much less attempt to prove, such an invidious intent on the part of the Tennessee legislature in its exemption of live cabarets from the operating-hour restrictions of the Act.

This leaves Bookmart with the argument that the Act's "underinclusiveness" constitutes content-based discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. But as we have discussed above in determining the proper level of scrutiny, an inference of content-based discrimination is inconsistent with the uncontroverted fact that the expressive content of live cabarets is virtually identical to that of adult bookstores. *DLS*, 107 F.3d at 411.

We conclude that the history behind the Act's passage, and the virtually identical expressive content as between live adult cabarets and adult bookstores, belies the notion that the Tennessee legislature made an impermissible distinction on the basis of content or that the operating-hours exemption of the live cabarets was invidious. This court has determined that "[a] state legislature may implement its program of reform by gradually adopting regulations that only partially ameliorate a perceived evil." *In re Grand Jury Proceedings*, 810 F.2d 580, 588 (6th Cir. 1987).

The District Attorney in fact argues that the legislature decided to exclude live cabarets from the operating-hour provisions of the Act simply because of the legislative efforts the year before that were aimed at combating the secondary effects associated with public nudity. Although the Act did not go as far as it might due to its exemption of live cabarets from the operating-hour restrictions placed on the regulated businesses, this does not make the Act unconstitutional. *See Roschen v. Ward*, 279 U.S. 337, 339, 73 L. Ed. 722, 49 S. Ct. 336 (1929) ("A statute is not invalid under the Constitution because it might have gone farther than it did."). Moreover, the legislature may select one phase of one field and apply a remedy there, neglecting the others. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976) (holding that Detroit "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems" in regulating adult movie theaters, book stores, and similar establishments); *see also McGowan v. Maryland*, 366 U.S. 420, 536, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961) ("That more or fewer activities than fall within the exceptions could with equal rationality have been excluded from the general ban does not make irrational the selection which has actually been made.") (Frankfurter, J. concurring).

The Tennessee legislature arrived at a plausible step-by-step approach to addressing these risks. This is the kind of judgment that is committed to state and federal legislatures rather than to the courts. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) ("In short, the judiciary is not to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental

rights nor proceed along suspect lines."). Given the overwhelming precedent upholding legislative step-by-step reform efforts and the lack of any invidious discrimination in exempting live cabarets from the Act's operating-hour provisions, we hold that the Act bears a rational relation to a legitimate governmental purpose, and therefore does not violate the Equal Protection Clause.

Bookmart's final argument is that the entire Act must be declared unconstitutional if any part is held invalid. It claims that because the Act lacks a severability clause, the provisions regarding viewing-booth configurations must also be struck down. Given our conclusion that the Act does not violate the Equal Protection Clause, however, we need not address Bookmart's argument concerning whether the provisions of the Act are severable.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

DISSENT

CLAY, Circuit Judge, dissenting. Because I would find the Act unconstitutional under the Equal Protection Clause due to its underinclusiveness, I respectfully dissent. The harmful secondary effects the Act was designed to prevent are just as likely, if not more likely, with the nonregulated live cabarets as they are with the regulated adult bookstores. Thus, the Acts's exemption of the live cabarets from its operating-hour restrictions leads to the conclusion that the Tennessee legislature has made an impermissible

distinction on the basis of the content of the regulated speech.

"The notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in First Amendment principles." *City of Ladue v. Gilleo*, 512 U.S. 43, 51, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994) (emphasis in original). Indeed, this Court has recognized that "in some cases, the underinclusiveness of a law - i.e., the failure of the government to regulate other, similar activity - may give rise to a conclusion that the government has in fact made an impermissible distinction on the basis of the content of the regulated speech." *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 (6th Cir. 1997). The *DLS* Court was not persuaded that the city ordinance in question was "one of those cases[;]" however, the Court's reasoning in arriving at that conclusion is illustrative in demonstrating why the Act in the matter at hand is one of those cases. *See id.*

DLS involved a challenge brought by a corporate owner and employees of a night club devoted to erotic dancing to a Chattanooga City Ordinance that regulated adult-oriented establishments, on the grounds that the ordinance was unconstitutional. *See DLS, Inc.*, 107 F.3d at 405. The City of Chattanooga originally enacted the ordinance in 1986 "to regulate 'adult-oriented establishments,' which were defined to include, *inter alia*, both 'adult cabarets,' or public facilities that feature employees who expose their breasts, buttocks, or genitals to public view, and 'adult bookstores,' or bookstores that also offer films or live entertainment that depict certain defined 'sexual activities' or 'anatomical areas.'" *Id.* After a series of amendments and constitutional challenges, the amended ordinance was challenged with respect to the provision that "prohibited entertainers from

approaching within six feet of customers, employees, or other entertainers during a performance . . . ." *Id.* In the course of making their argument that the provision violated the First Amendment, the plaintiffs claimed that the provision was not content neutral because it did not regulate similar activities.[1] *Id.* In other words, the plaintiffs argued that the provision was unconstitutional because it was underinclusive. *Id.*

This Court then recognized that "in some rare cases, the underinclusiveness of a law - i.e., the failure of the government to regulate other, similar activity - may give rise to a conclusion that the government has in fact made an impermissible distinction on the basis of the content of the regulated speech." *DLS, Inc.*, 107 F.3d at 411. In finding that the matter before it was "not one of those cases[,]" the Court noted that "the expressive content of the items in plaintiffs' laundry list of unregulated transactions is virtually identical to that of erotic dancing; *however, none of the items carries with it the same danger of crime and disease that the adult cabarets do.*" *Id.* (emphasis added).

Here, on the other hand, Defendants have offered nothing to indicate that the purported secondary effects that the Act was designed to prevent - increased crime and prostitution, reduced property values, urban blight, the spread

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[1] The plaintiffs actually styled their argument in this regard as a challenge to the ordinance under the Equal Protection Clause; however, the Court noted that in such cases, if a sufficient rationale exists for the ordinance under the First Amendment, then a rational basis exists for the alleged disparate treatment under the Equal Protection Clause. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 412 n.7 (6th Cir. 1997).

of sexually transmitted and communicable diseases, and an overall downturn in the quality of life - are any less of a concern with live adult cabarets than with the adult bookstores, thereby making this case distinguishable from *DLS*. Indeed, when asked at oral argument as to why these secondary concerns are not present with live cabarets, Defendant offered no response. Common sense would seem to dictate that, if anything, the secondary effects would be *more* of a concern with live cabarets inasmuch as unlike the instance with adult bookstores where patrons purchase sexually explicit material for use or viewing at some location away from the store itself, patrons of live cabarets are viewing and experiencing the sexually explicit material at that location, thereby making it more likely that the patron would have sexual contact with an entertainer, or to engage in lewd acts in the surrounding area. In fact, the Supreme Court has found constitutional an Indiana state ordinance requiring otherwise nude dancers to wear pasties and G-strings, recognizing that the ordinance was enacted to protect the public from harmful secondary effects of such live nude establishments. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569-70, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991).

Because the nonregulated live cabarets of the kind involved here raise the same specter of secondary effects associated with the regulated adult bookstores, it should be concluded that the Tennessee legislature "in fact made an impermissible distinction on the basis of the content of the regulated speech." *DLS, Inc.*, 107 F.3d at 411 (finding that because "none of the items in [the laundry list of unregulated activities] carries with it the same danger of crime and disease that the [regulated activities] do[,]" the ordinance was not impermissibly content based). In other words, this Court has

guided us with the directive that where the expressive content of a regulated and a nonregulated activity are the same, we must look to secondary effects of the two activities or establishments to determine the content neutrality of the ordinance. *Id.* Where no differences can be drawn, a conclusion of constitutional infirmity may be reached. *Id.*

The majority attempts to diminish the force of this Court's directive in *DLS* - that a regulation may be considered underinclusive and therefore run afoul of the Constitution when the secondary effects of a regulated activity and those of an unregulated similar activity are indistinguishable - by couching the *DLS* directive as "a single clause." The force of a directive cannot be minimized by the brevity of its grammatical characterization. Indeed, the First Amendment itself is a "*single*" sentence upon which the jurisprudence of our country is deeply committed to every "*clause*" therein. *See Bonnell v. Lorenzo*, 241 F.3d 800, 827 (6th Cir. 2001) ("We hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance -- a value protected by every clause in the single sentence called the First Amendment . . . .") (quoting Edward J. Cleary, Beyond the Burning Cross 198 (1995) (quoting speech of Justice Stevens)). In addition, the force of the "single clause" directive in *DLS* cannot be swept aside as the majority attempts to do by rendering the directive some sort of "bolstering" device, or by simply looking to the expressive content of the two activities involved. To do so negates the very characteristic which this Court found outcome determinative in *DLS*; namely, that the secondary effects between the regulated and the nonregulated establishments were different.

Similarly, the force of the *DLS* directive cannot be minimized by the majority's claim that it is a mere "inference" that I have drawn from the case. The majority contends that such an "inference" is "inconsistent with the uncontested fact that the expressive content of the live cabarets and adult bookstores is virtually identical." As noted, the directive that an ordinance may be considered content based when the expressive content as well as the secondary effects of the two establishments are the same, is a premise - not an inference, that this Court found so significant that the case turned on the fact that the secondary effects between the two establishments there were different.

Along this line, the significant fact that the secondary effects of the regulated bookstores and unregulated live cabarets are the same cannot be summarily dismissed by the majority's speculation that the Tennessee legislature "apparently" differentiated between the two types of establishments not on the content of their expression, but on the medium of their expression, "simply because the legislature had dealt with the secondary effects of live cabarets the year before and turned to bookstores the following year." In support of this conclusion, the majority relies upon a case from the Ninth Circuit, *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989). It is true, as the majority contends, that the Ninth Circuit found that Arizona's obscenity statute, which provided an exemption for cable television operators but not booksellers, did not violate the Equal Protection Clause under a rational basis standard of review. However, the Ninth Circuit did so, in part, on the "valid distinctions between cable and other broadcasting." *See id.* at 1051. Specifically, the court noted that the Arizona legislature "may have determined that . . . cable television is

less pervasive and extreme in its sexual content." *Id.* Here, unlike in *Ripplinger*, there are no distinctions between the expressive content nor the secondary effects of the regulated bookstores and the nonregulated live cabarets.

The underinclusiveness of a regulation may fall afoul of the Equal Protection Clause rendering the regulation unconstitutional. *See DLS, Inc.*, 107 F.3d at 411. Because the dangers posed by live cabarets not only carry the specter of dangers the Act seeks to prevent, but in fact may carry with them a greater likelihood of these dangers, I would hold the Act unconstitutional as underinclusive. The majority's contention that this conclusion cannot be reached where the content of the speech is virtually identical, fails to consider the significance of when the secondary effects of each are also virtually identical as espoused by this Court in *DLS*.

For the above-stated reasons, I would hold the Act unconstitutional, and therefore respectfully dissent.[2]

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[2] I would find the entire Act unconstitutional inasmuch as the Act lacks a severability clause. *See State ex rel. Barker v. Harmon*, 882 S.W.2d 352, 355 (Tenn. 1994) (noting that the doctrine of elision is not favored in Tennessee, and that without the inclusion of a severability clause in the statute, severability of the invalid portion of a statute in order to allow the remainder to survive is not proper).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5563

[Filed March 28, 2002]

RICHLAND BOOKMART, INC., DOING BUSINESS AS TOWN AND COUNTRY,	)
Plaintiff-Appellant,	)
v.	)
RANDALL E. NICHOLS,	)
Defendant-Appellee.	)

JUDGES:
BEFORE CLAY and GILMAN, Circuit Judges; and WISEMAN,* District Judge.

* Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:95-CV-349

[Filed March 31, 2000]

RICHLAND BOOKMART, INC., d/b/a TOWN AND COUNTRY	)
Plaintiff	)
v.	)
RANDALL NICHOLS AND CITY OF KNOXVILLE,	)
Defendants	)

MEMORANDUM OPINION

This matter is back before the court for consideration of several pending motions. Plaintiff, an adult bookstore located in Knox County, Tennessee, has challenged the constitutionality of Tennessee's Adult Oriented Establishment Act (1995 Tenn. Pub. Act 421, codified at Tenn. Code Ann. §§ 7-51-1401 *et seq.)* ("the Act"). This court issued a preliminary injunction enjoining enforcement of the Act by

finding that the closing hour restrictions violated the First Amendment and also that the statute was unconstitutional in its overbreadth and vagueness. The preliminary injunction was later made permanent. Defendant, Randall Nichols,[1] appealed the permanent injunction to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed and vacated the permanent injunction and remanded the case for further proceedings. Since this court did not reach the equal protection issue, the Sixth Circuit expressed no opinion in that regard and remanded the case for further proceedings consistent its opinion. The court has now conducted further proceedings by hearing oral argument on the pending motions concerning plaintiff's equal protection argument. Plaintiff also contends that the Act violates the First Amendment and Article I, § 19 of the Tennessee Constitution as being "underinclusive."

Several motions have been filed since the case returned from the Sixth Circuit. Plaintiff has filed a motion for preliminary injunction [doc. 31] and a motion for summary judgment [doc. 44]. Defendant has filed a motion for judgment on the pleadings [doc. 34] and a resubmission of the motion for judgment on the pleadings also alternatively as a motion for summary judgment [doc. 44]. The parties agreed at a status conference to maintain the status quo; therefore, the court will not address the motion for a preliminary injunction which will be denied as moot. The court will only address the merits of the dispositive motions and legal

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[1] The other original defendant, City of Knoxville, has been dismissed from this case [docs. 25, 26]. Further references to "defendant" herein are in reference to the remaining defendant, Randall Nichols.

questions they put before it concerning the plaintiff's challenge to the Act based upon its alleged "underinclusiveness" and alleged violation of plaintiff's equal protection rights.

Defendant's motion for judgment on the pleadings is brought pursuant to Fed. R. Civ. P. 12(c). In that motion, defendant is seeking dismissal for failure to state a claim upon which relief can be granted. The motion was filed after defendant's answer [doc. 13]. "Rule 12(h)(2) provides that the Rule 12(b)(6) defense of failure to state a claim upon which relief may be granted can be raised after an answer has been filed by motion for judgment on the pleadings pursuant to Rule 12(c)." *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 11 (6th Cir. 1987). The standard of review for a Rule 12(b)(6) motion is applied to a Rule 12(c) motion. *Id.* However, Rule 12(c) provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . . "Fed. R. Civ. P. 12(c). In this case, matters outside the pleadings have been presented to and accepted by the court, and defendant has also resubmitted his motion for judgment on the pleadings in the alternative as a motion for summary judgment [doc. 43]. The court will consider defendant's motion for judgment on the pleadings as one for summary judgment. For the reasons stated herein, defendant's motions will be granted, and plaintiff's motion for summary judgment will be denied. The court will first address plaintiff's equal protection challenge.

As is already clear from the record, the Act addresses the "secondary effects" associated with adult oriented establishments. The Act exempts from the hours of operation

restrictions set out in Tenn. Code Ann. § 7-51-1402 certain adult entertainment establishments offering "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting." Tenn. Code Ann. § 7-51-1405. It is this provision which plaintiff contends violates its equal protection rights and which is also underinclusive in violation of the First Amendment and Article I, § 19 of the Tennessee Constitution.

The parties do not agree on what assessment standard should be applied in analyzing plaintiff's equal protection challenge. Defendant argues that the rational basis standard should be employed. Plaintiff, however, contends that strict scrutiny should be applied, but even if a rational basis standard is used, the statute still violates equal protection.

Strict scrutiny is employed when a legislative classification impacts a suspect class or fundamental right. *See In re Grand Jury Proceedings*, 810 F.2d 580, 587 (6th Cir. 1987); *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 621 (6th Cir. 1997). Under the strict scrutiny standard, a law impacting a fundamental right or suspect class "will be sustained only if [it is] suitably tailored to serve a compelling state interest." *37712, Inc.*, 113 F.3d at 621 (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)). A less stringent standard is applied when a "quasi-suspect" class is affected, such as gender or illegitimacy. *37712, Inc.*, 113 F.3d at 621(citing *Cleburne*, 473 U.S. at 440-41,105 S.Ct. at 3254-55).

The least demanding standard is the rational relationship or rational basis standard. *See 37712, Inc.*, 113

F.3d at 621-22; *In re Grand Jury,* 810 F.2d at 587. Legislation which does not impact on a suspect or quasi-suspect class or a fundamental right "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *37712, Inc.,* 113 F.3d at 622 (quoting *Cleburne,* 473 U.S. at 439-40, 105 S.Ct. at 3254; *see Romer v. Evans,* 517 U.S. 620, ---, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996)). A legislative classification does not violate equal protection if it "rationally furthers the purpose identified by the State." *In re Grand Jury,* 810 F.2d at 587 (quoting *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976); *Darks v. City of Cincinnati,* 745 F.2d 1040, 1042-43 (6th Cir. 1984)). Defendant contends this standard applies since the Sixth Circuit has found no First Amendment, i.e. fundamental right, violation and there is no suspect class involved.

In support of its contention concerning the level of scrutiny to be applied in the equal protection analysis, plaintiff relies on the argument in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 63-73, 96 S.Ct. 2440, 2448-2454, 49 L.Ed.2d 310 (1976) and *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 55 n.4, 106 S.Ct. 925, 933 n.4, 89 L.Ed.2d 29 (1986). In *American Mini Theatres,* the Supreme Court held that ordinances which prohibited the operation of adult movie theaters, bookstores and similar establishments within 1,000 feet of any other such establishment or within 500 feet of a residential area did not violate the First Amendment or equal protection. In *City of Renton,* the Supreme Court upheld a zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church,

park or school. The stated purpose of the ordinance was to curb the "secondary effects" of adult establishments. The Supreme Court stated: "Here, as in American Mini Theatres, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment." *City of Renton,* 475 U.S. at *54-55,* 106 S.Ct. at 932-33. The Court then in a footnote stated:

> Respondents argue, as an "alternative basis" for affirming the decision of the Court of Appeals, that the Renton ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. *See Young v. American Mini Theatres, Inc.,* 427 U.S., at 63-73, 96 S.Ct., at 2448-2454.

Id., 475 U.S. at 55, 106 S.Ct. at 933.

In *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1997), the Sixth Circuit addressed a First Amendment challenge to a city ordinance regulating adult-oriented establishments which contained a provision prohibiting entertainers from approaching within six feet of customers, employees, or other entertainers during a performance. The Court upheld the buffer-zone requirement finding that it was sufficiently narrowly tailored to be valid under the First Amendment. *Id.* at 413. Plaintiffs contended that similar activities which the City saw fit not to regulate demonstrated that the ordinance was not content neutral and

in violation of the Equal Protection Clause. In addressing this argument, the Court dropped a footnote and stated:

> The plaintiffs have styled this argument as a challenge to the ordinance under the Equal Protection Clause. In cases such as this one, the Equal Protection Clause adds nothing to the First Amendment analysis; if a sufficient rationale exists for the ordinance under the First Amendment, then the City has demonstrated a rational basis for the alleged disparate treatment under the Equal Protection Clause. *See Renton,* 475 U.S. at 55 n.4, 106 S.Ct. at 933 n.4; *Young v. American Mini Theatres,* 427 U.S. 50, 63-73, 96 S.Ct. 2440-2448-54, 49 L.Ed.2d 310 (1976) (plurality opinion) (emphasis added).

Id., at 412, n.7. Obviously, the Sixth Circuit references the same equal protection authorities and analysis that plaintiff relies on here and that the Supreme Court relied on in *City of Renton.* In *City of Renton,* the Supreme Court addressed the equal protection argument in a footnote and found no violation. *City of Renton,* 475 U.S. at 55, n.4, 106 S.Ct. at 933, n.4 ("As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself.").

Applying the same analysis to the case herein, this court concludes that there is no equal protection violation. In its analysis of the First Amendment issue in this case, the Sixth Circuit found that the statute served a "substantial government interest" by seeking to address the secondary

effects of adult establishments. Thus the Court found "a sufficient rationale" for the statute under the First Amendment and held:

> Reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a "substantial government interest." The Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation. It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug "corners" on the surrounding streets. By deterring such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store fronts, a blighted appearance and the lowering of the property values of home and shopping areas.

Richland Bookmart, Inc. v. Nichols, 137 F.3d 435,440-41 (6th Cir. 1998). The Court went on to note that access to the adult establishments would not be unduly restricted and they could still be open many hours during the week. The Sixth Circuit has found that a sufficient rationale exists for the Act under the First Amendment. Based on the preceding discussion, this court concludes that the Act does not violate the equal protection clause.

Plaintiff also constitutionally challenges the Act by alleging that it is "underinclusive" because it exempts from

the hours restrictions certain live adult cabaret type establishments. The Sixth Circuit addressed the underinclusive argument in *DLS, Inc., supra,* and stated:

> While in general there is no such thing as a First Amendment challenge for "underbreadth," (citation omitted), in some rare cases, the underinclusiveness of a law -- i.e., the failure of the government to regulate other, similar activity -- may give rise to a conclusion that the government has in fact made an impermissible distinction on the basis of the content of the regulated speech. (citation omitted). This is not one of those cases.

DLS, Inc., 107 F.3d at 411. This court concludes that the exclusion of certain live entertainment establishments from the hours restrictions in the Act is not an impermissible distinction based on content. Prior to passage of the Act at issue herein, the Tennessee legislature passed the Public Indecency Statute, Tenn. Code Ann. § 39-13-511.[2] That act regulates public nudity and in so doing addresses cabaret type entertainment establishments which have live performers. Reform efforts by a state legislature may be implemented gradually or in stages. *See In re Grand Jury, supra.* The Sixth Circuit also addressed the issue of underinclusiveness in the

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[2] The Sixth Circuit has upheld the constitutionality of the Tennessee Public Indecency Statute. *In re Tennessee Public Indecency Statute,* 172 F.3d 873 (Table) No. 96-6512, 97-5938, 96-6573, 97-5924, 1999 WL 55276 (6th Cir. Jan. 13, 1999),*petition for cert. filed* 67 U.S.L.W. 3758 (U.S. June 3, 1999) (No. 98-1935), 68 U.S.L.W. 3007 (June 16, 1999) (No. 98-2021).

In re Grand Jury case and quoted the following principles set forth by the Supreme Court in *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966):

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward,* 279 U.S. 337, 339, 73 L.Ed. 722, 49 S.Ct. 336, that a legislature need not "strike at all evils at the same time," *Semler v. Dental Examiners,* 294 U.S. 608, 610, 79 L.Ed. 1086, 1089, 55 S.Ct. 570, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489, 99 L.Ed. 563,573, 75 S.Ct. 461.

In re Grand Jury, 810 F.2d at 588 *(quoting Katzenbach,* 384 U.S. at 657, 86 S.Ct. at 1727). Plaintiff has not shown that it was irrational for the Tennessee legislature to address the secondary effects of adult oriented establishments as it did by first passing the Public Indecency Statute and then the Act at issue herein. Nor has plaintiff shown that the legislature acted irrationally by restricting the days and hours of operation for establishments subject to the Act. The court concludes that the exemption from the hours restrictions at issue is not a classification in violation of equal protection.

For the reasons stated herein, defendant's motion for

judgment on the pleadings [doc. 34] and the motion for judgment on the pleadings or alternatively for summary judgment resubmitted by defendant [doc. 43] will be granted. The motion for summary judgment filed by plaintiff [doc. 44] will be denied, and the motion filed by plaintiff for a preliminary injunction [doc. 31] will be denied as moot. An order reflecting this opinion will be entered.

ENTER:

/s/ _____
Leon Jordan
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-6472

[Filed February 27, 1998]

RICHLAND BOOKMART, INC., d/b/a TOWN AND COUNTRY,

Plaintiff-Appellee,

v.

RANDALL E. NICHOLS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville
No. 95-00349
R. Leon Jordan, District Judge

JUDGES:

Before MERRITT, BATCHELDER, and FARRIS,* Circuit Judges.

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION

MERRITT, Circuit Judge. The defendant below, Randall E. Nichols, District Attorney for Knox County, Tennessee, appeals a permanent injunction entered by the district court against enforcement of statutory amendments to the Tennessee Adult-Oriented Establishment Act. The new statute limits the hours and days during which adult entertainment establishments can be open and requires such establishments to eliminate the closed booths in which patrons watch sexually-explicit videos or live entertainment.

The injunction was entered after plaintiff, Richland Bookmart, Inc., an adult bookstore in Knox County, Tennessee, challenged the constitutionality of the state law on the grounds that it violates the First Amendment and the Equal Protection Clause of the United States Constitution. The district court held that although the statute was content-neutral, the hours and days limitation violated the First Amendment because it was not narrowly tailored to address the stated goal of the statute -- the alleged deleterious "secondary effects" on neighborhoods and families caused by the presence of adult establishments. Having decided the case on the First Amendment ground, the district court did not reach plaintiff's equal protection argument. For the reasons stated below, the judgment of the district court is reversed and the case is remanded to the district court with instructions to vacate the permanent injunction.

I. The Statute in Question

On June 26, 1995, plaintiff, Richland Bookmart, Inc., a seller of sexually-explicit books, magazines and videos, filed a complaint for preliminary injunction, permanent injunction and declaratory judgment requesting that the district court declare Tennessee's Adult Oriented Establishment Act (1995 Tenn. Pub. Act 421, codified at Tenn. Code Ann. §§ 7-51-1401 *et seq.*) to be unconstitutional on its face or as applied to plaintiff. After a hearing on the preliminary injunction, the district court issued a preliminary injunction enjoining enforcement of the act. The injunction was made permanent on September 26, 1996, and defendant, District Attorney General for Knox County Randall Nichols, appealed to this Court.

Presumably in anticipation of expected First Amendment challenges, the act contains a lengthy preamble. Because the district court carefully summarized the long preamble, we will highlight only relevant portions here.

The preamble discusses the need to outlaw closed video booths because these booths are often used by patrons to stimulate themselves sexually, creating a public health problem. This provision does not apply to plaintiff. It does not have closed booths on its premises. Plaintiff sells adult books and magazines and sells and rents adult videos for off-premises viewing only. The preamble also lists detrimental health, safety and welfare problems caused by shops selling graphic sexual material -- the so-called "secondary effects," of the establishments on the communities that surround them -- and cites specific land-use studies done by other cities on the subject. The "secondary effects" identified include "increased crime, downgrading of property values and spread of sexually transmitted and communicable diseases."

The preamble continues with a list of "unlawful and/or dangerous sexual activities" associated with adult-oriented establishments and ends with a list of citations to judicial decisions supporting such legislation.

The act defines "adult-oriented establishment" as "any commercial establishment . . . or portion thereof" selling as its "predominant stock or trade . . . sexually oriented material."[1]

"Sexually-oriented material" is defined as any publication "which depicts sexual activity . . . or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals in a discernibly turgid state, even if completely covered."[2]

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[1] The complete definition is as follows:

> any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominant stock or trade, sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults.

Chapter 421, Section 2(4).

[2] The complete definition of "sexually oriented material" is as follows:

> any book, article, magazine, publication or written matter of any kind, drawing, etching, painting,

Section 3 prohibits adult-oriented establishments from opening before 8 a.m. or after midnight Monday through Saturday, and from being open at all on Sundays or the legal holidays listed in the Tennessee Code Annotated.

Section 4 prevents the use of private booths, stalls or partitioned rooms for sexual activity. Because plaintiff here does not have any private booths, the district court did not address this portion of the act.

Section 5 describes the criminal penalties under the act. A first offense for a violation is a Class B misdemeanor punishable by a fine of $ 500. Subsequent violations are Class A misdemeanors with no penalty specified in the statute. The Tennessee Code provides that Class A misdemeanors carry a penalty for a fine not to exceed $ 2500, imprisonment not to exceed 11 months and 29 days or both, unless the statute provides otherwise. Tenn. Code Ann. § 40-35-111.

Section 6 states that live stage shows, adult cabaret and dinner theatre are excepted from the closing hours

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> photograph, motion picture film or sound recording, which depicts sexual activity, actual or simulated, involving human beings or human beings and animals, or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals in a discernibly turgid state, even if completely covered.

Chapter 421, Section 2(10).

requirement. Section 7 allows local governments to impose other "lawful and reasonable" restrictions on adult-oriented establishments.

Plaintiff contends that the law violates both its First Amendment rights through the closing hours requirement and its equal protection rights by exempting certain other establishments that sell or trade in adult-oriented goods or services as at least part of their business.

The district court granted a preliminary injunction, later made permanent, against enforcement of the act, finding that the closing hours restrictions violate the First Amendment. The district court concluded that plaintiff was likely to succeed on the merits of its constitutional challenge because the act (1) goes beyond what is necessary to further the state's legitimate interest in regulating the secondary effects described in the act's preamble, (2) is overbroad and (3) is vague. The district court did not reach plaintiff's equal protection argument.

II. Analysis of Facial Validity of the Statute

This case arises from the tension between two competing interests: free speech protection of erotic literature and giving communities the power to preserve the "quality of life" of their neighborhoods and prevent or clean up "skid-rows." The tension arises because the First Amendment offers some protection for "soft porn," *i.e.*, sexually-explicit, nonobscene material -- although "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled [**8] political debate. . . ." *Young v. American Mini Theatres*, Inc.,

427 U.S. 50, 70, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). The Supreme Court most recently restated this view that "porn-type" speech is generally afforded less-than-full First Amendment protection in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (nude dancing).

The normal starting point for a discussion of the facial validity of statutory regulation of speech requires an analysis of the so-called "content-neutrality" of the regulation. Here, the bookstore contends that the act is a "content-based" regulation and therefore presumptively unconstitutional and subject to "strict scrutiny." The defendant prosecutor argues that the act is content-neutral and that the closing requirements are permissible "time, place and manner" regulation subject to the less exacting "intermediate scrutiny."

We agree with plaintiff that the legislation at issue here is obviously not content-neutral. The statute focuses on and regulates only "sexually-explicit" or porn-type speech. This is no more content neutral than a statute designed to regulate only political campaign advertising, newspaper [**9] want ads or computer graphics. The law singles out certain establishments for regulation based only on the type of literature they distribute. *But see Barnes*, 501 U.S. at 585 (Souter, J., concurring) and *Mitchell v. Commission on Adult Entertain. Estabs.*, 10 F.3d 123 (3d Cir. 1993) (describing regulation of such sex literature as content neutral because it is designed to counter bad behavior in the neighborhood where it is sold).

The fact that such regulation is based on content does not necessarily mean that regulation of nonobscene, sexually-

explicit speech is invalid. The law developed under the First Amendment offers such speech protection "of a wholly different, and lesser magnitude." *Young v. American Mini Theatres*, 427 U.S. at 70. In *American Mini Theatres*, the Court expressly ruled that the City of Detroit may legitimately use the content of adult motion pictures as the basis for treating them differently from other motion pictures. In order to prevent and clean up skid-rows, the ordinance confined theatres showing sex movies to a few areas of the city. A plurality of the Court upheld a content-based zoning ordinance restricting the location of adult movie theatres. The Court held that even though such sexually-explicit literature, unlike obscenity, is protected from total suppression, "the State may use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70-71. Justice Steven's opinion is straightforward and clear. It says that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Id.* at 61. The Court concluded that the classification made by the City of Detroit was justified by the City's interest in preserving its neighborhoods from deterioration -- the now so-called "secondary effects" of erotic speech. The ordinance was upheld because it did not unduly suppress access to lawful speech. *American Mini Theatres* recognized that regulation based on content may be necessary to protect other legitimate interests. The Court did not try to maintain that the ordinance *was*, in fact, content- neutral; it stated only that it might be *treated* as if it were content-neutral because, like commercial speech, it is less than fully protected.

Justice Powell, concurring in *American Mini Theatres*,

elaborated on the special circumstances presented when reviewing regulation of erotic or sexually-explicit speech:

> Moreover, even if this were a case involving a special government response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.

American Mini Theatres, 427 U.S. at 82 n.6 (cases omitted). Justice Powell specifically pointed out that sexually-explicit speech is different from other kinds of speech and, although protected to a certain degree, is offered less protection because other important social interests are at stake when sexually-explicit speech is at issue. Erotic or sexually-explicit literature is in a unique category, a category unto itself that the Supreme Court has decided may be regulated without subjecting the regulation to so-called "strict scrutiny" with its accompanying presumption of unconstitutionality.

Many have severely criticized the holding and rationale of *American Mini Theatres*,[3] including initially the

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[3] Criticism of the analysis used in *American Mini Theatres* and later in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), is extensive in the legal literature. For a representative sample, *see*, *e.g.*, Laurence Tribe, *American Constitutional Law* § 12-3 (2d ed. 1988); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 351-53 (1997); Elena Kagan, *Private Speech, Public*

four dissenters led by Justice Stewart, but a majority of the Court has adhered to its view allowing anti-skidrow, content-based regulation of establishments selling pornographic literature, movies, dancing and other hard-core erotic material. In a subsequent case, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), the Court upheld a content-based zoning ordinance enacted by the City of Renton, Washington, that prohibited adult motion picture theatres from locating within 1,000 feet of family dwellings, churches, parks or schools.

The intervening years had reduced the number of dissenters on the Court from four to two. Now it was only Justices Brennan and Marshall in dissent. Relying primarily on *American Mini Theatres*, the Court in *Renton* analyzed the ordinance as a form of time, place and manner regulation, although recognizing that a law that focuses on such films is obviously not content neutral. The Court acknowledged candidly that both ordinances treated adult theatres differently than other types of theatres, the traditional touchstone of content-based legislation.

The Court went on in *City of Renton* to explain that the

Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 483-91 (1996); Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Const. L. Q. 99, 125-28 & n.137 (1996); Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1265-67 (1995); Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 Iowa L. Rev. 51, 68-70 (1994); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 104, 114-17 (1987).

ordinance did not contravene the fundamental principles that underlie concerns about content-based speech regulations because its stated purpose is to curb the "secondary effects" of adult establishments. Accordingly, the Court in *City of Renton*, like the Court in *American Mini Theatres*, decided that the zoning ordinances at issue could be reviewed under the standard applicable to content-neutral regulations, even though the ordinances were plainly content-based. The stated rationale is that a distinction may be drawn between adult theatres and other kinds of theatres "without violating the government's paramount obligation of neutrality in its regulation of protected communication" because it is seeking to regulate the secondary effects of speech, not the speech itself. *City of Renton*, 475 U.S. at 49 (quoting *American Mini Theatres*, 427 U.S. 50 at 70).

Over the last decade, some courts reviewing these type of regulations started simply referring to them as content-neutral without explaining, as the Supreme Court carefully did in both *American Mini Theatres* and *City of Renton*, that they are in fact content-based but are to be *treated* like content-neutral regulations for some purposes. *See, e.g., North Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996), *cert. denied*, 136 L. Ed. 2d 609, 117 S. Ct. 684 (1997); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 995 (4th Cir. 1995); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir. 1994); *TK's Video, Inc. v. Denton County*, Tx., 24 F.3d 705, 707 (5th Cir. 1994); *Mitchell v. Commission on Adult Entertain. Estabs.*, 10 F.3d 123, 128-31 (3d Cir. 1993). Thus, in some cases, a kind of legal fiction has been created that calls regulation of such literature "content neutral" when what is meant is only that the

regulation is constitutionally valid.

Under present First Amendment principles governing regulation of sex literature, the real question is one of reasonableness. The appropriate inquiry is whether the Tennessee law is designed to serve a substantial government interest and allows for alternative avenues of communication. Does the law in question unduly restrict "sexually explicit" or "hard-core" erotic expression?

Reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a "substantial government interest." The Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation. It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug "corners" on the surrounding streets. By deterring such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store fronts, a blighted appearance and the lowering of the property values of homes and shopping areas. Such regulation may prevent the bombed-out, boarded-up look of areas invaded by such establishments. At least that is the theory, and it is not unreasonable for legislators to believe it based on evidence from other places.

The legislation leaves open alternative avenues of communication. Access to adult establishments is not unduly restricted by the legislation. Adult establishments may still be open many hours during the week.

III. Overbreadth and Vagueness

Plaintiff contends, and the district court agreed, that the act is also unconstitutionally vague in that certain terms are not defined. We believe the terms are sufficiently defined so that a reasonable person would understand them.

Specifically, the district court found that the act's alleged vagueness may have a "chilling effect" on erotic literature that has "literary, artistic or political value." It also found that the word "paraphernalia" as used in the act might include places such as lingerie shops.

First, the plaintiff's establishment here clearly falls within the purview of the statute. In *American Mini Theatres*, the Court found that it was unnecessary to consider vagueness when an otherwise valid ordinance indisputably applies to the plaintiff -- when there is no vagueness as to him. 427 U.S. at 58-59. *See also City of Renton*, 475 U.S. at 55 n.4. Plaintiff is clearly an "adult-oriented establishment" as defined in the act. Any element of vagueness in the act does not affect this plaintiff.

Second, the law is not as vague as the bookstore contends. To be included within the purview of the act, an establishment must (1) have as its "principal or predominant stock or trade" sexually-oriented materials, devices or paraphernalia and (2) restrict admission to adults only. The terms used in the act are understandable common terms. Most buyers, sellers and judges know what such materials are and who are adults and who are children.

The Supreme Court examined overbreadth in detail in

New York v. Ferber, 458 U.S. 747, 773-74, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982). In *Ferber*, the Court refused to find as unconstitutionally overbroad a state statute prohibiting persons from knowingly promoting sex by children under 16 by selling such material. The Court held that the mere possibility that some protected expression, some erotic literature, could arguably be subject to the statute was insufficient reason to find it unconstitutionally overbroad. The Court said that we should not assume that state courts would broaden the reach of a statute by giving it an "expansive construction." This is consistent with Tennessee law that provides that such regulation of speech should be construed narrowly. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 526 (Tenn. 1993).

* * *

Plaintiff also contends that the act violates its equal protection rights because the act exempts from regulation establishments offering "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting." The district court did not reach this issue and did not issue an injunction on this ground. We express no opinion on whether the act violates plaintiff's equal protection rights because this argument has not been fully developed or reviewed in the district court.

Accordingly, the preliminary injunction issued by the district court is vacated and set aside and the case remanded for further proceedings consistent with this opinion.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:95-CV-0349

[Filed September 26, 1996]

RICHLAND BOOKMART, INC., d/b/a TOWN AND COUNTRY,

Plaintiff,

v.

RANDALL E. NICHOLS and CITY OF KNOXVILLE,

Defendants.

MEMORANDUM OPINION

On September 26, 1995, this court filed a memorandum opinion [doc. 14] in which it held 1995 Tenn. Pub. Acts 421 unconstitutional. The court enjoined the defendants from enforcing this act [doc. 15] , and ordered the defendants to show cause against a final judgment making this injunction permanent [doc. 16].

The defendant Randall Nichols, the District Attorney General for the Sixth Judicial District of Tennessee, has responded [doc. 21] to the court's order to show cause. The plaintiff has replied [docs. 23 and 24] to this response. The defendant General Nichols' response revisits many of the legal issues which the court addressed in its September 26, 1995, memorandum opinion, and relies also on "studies, reports, letters, caselaw, and other information, which were presented to or available for the [Tennessee General Assembly] to consider when enacting 1995 Tenn. Pub. Acts 421." Affidavit of Betty Jackson [doc. 21, attachment]. Upon consideration of the material filed by the responding defendant, the court finds no reason to revise its ruling contained in its memorandum opinion filed on September 26, 1995, and will accordingly make permanent the injunction awarded earlier in this civil action.

The defendant City of Knoxville has moved to dismiss the plaintiff's claims against it in this civil action, or, in the alternative, for a summary judgment of dismissal of the claims against it [doc. 22]. The defendant city's motion is supported by affidavit evidence showing that the plaintiff's place of business is not within the corporate limits of the City of Knoxville. This evidence is uncontroverted, the plaintiff not having responded to this motion within the time allowed by L.R. 7.1, E.D. Tenn. "Failure to respond to a motion may be deemed a waiver of any opposition to the relief sought." L.R. 7.2, E.D. Tenn. The court will accordingly dismiss the plaintiff's claims against the defendant city in this civil action.

The court will enter an order in accordance with this memorandum opinion.

ENTER:

/s/ _____
Leon Jordan
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:95-CV-0349

[Filed September 23, 1995]

RICHLAND BOOKMART, INC., d/b/a TOWN AND COUNTRY,

Plaintiff,

v.

RANDALL NICHOLS and CITY OF KNOXVILLE,

Defendants.

MEMORANDUM OPINION

In this civil action, the plaintiff, an operator of an adult bookstore, seeks an injunction against enforcement of 1995 Tenn. Pub. Acts 421, entitled "AN ACT To amend Tennessee Code Annotated, Title 7, Chapter 51, relative to adult-oriented establishments." The court has heard the arguments of counsel, and is now prepared to rule on the plaintiff's motion for a preliminary injunction.

Consideration of the issues presented requires a detailed analysis of Public Chapter No. 421. The act contains an unusually long preamble, apparently drafted in anticipation of First Amendment challenges. The first four paragraphs of the preamble, each beginning with "WHEREAS," refer to public health problems associated with closed booths, stalls, or cubicles used in adult entertainment establishments to provide patrons with private entertainment. As will be seen below, these problems are not present in this case; the plaintiff sells books and magazines and sells and rents videocassettes, and does not provide any form of private entertainment.

The fifth paragraph of the preamble is broader. It refers to a need for "special supervision from public safety and health agencies" of adult-oriented establishments, "to protect and preserve the health, safety and welfare" of their patrons, and of the public at large.

The sixth, seventh and eighth paragraphs refer to a more specific health, safety or welfare concern, that of the secondary effects of adult-oriented establishments on businesses and residential areas which surround them. In the sixth paragraph, the act cites by city and date numerous land-use studies of this subject. In the seventh, the act asserts that such studies show that adult-oriented establishments "have a deleterious effect on existing businesses around them, the surrounding residential areas, and the public at large," which deleterious effect results in, "among other adverse secondary effects, increased crime, downgrading of property values and spread of sexually transmitted and communicable diseases." In the eighth paragraph of the preamble, the act refers to

"serious objectional (sic: objectionable) operational characteristics" of adult-oriented establishments, which are stated to include location, hours of operation, and physical layout, and which are stated to contribute to "crime, disease, lower property values, urban blight and downgrading of the quality of life."

The next two paragraphs of the preamble, the ninth and tenth, are essentially a list of "unlawful and/or dangerous sexual activities" which are asserted to accompany, concentrate around, or be aggravated by an adult-oriented establishment. Listed are prostitution, indecent exposure, public or indiscriminate masturbation and other sexual conduct, pandering, unprotected sexual conduct, distribution of obscene materials and child pornography, possession and sale of controlled substances, violent crimes, property crimes, and exposure of minors to harmful materials. The next paragraph, the eleventh, refers to the legitimacy of concern over sexually transmitted diseases, including AIDS.

The final two paragraphs of the preamble, the twelfth and thirteenth, contain numerous citations to judicial decisions. Some of these decisions are asserted to support the proposition that states and cities may rely on the experiences of other jurisdictions to justify regulation of adult-oriented establishments, without waiting to experience the asserted secondary effects of such establishments. Others are cited to support reasonable restrictions on the hours of operation of such establishments. Still others are cited concerning "restrictions on the configuration and viewability of the peep show motion picture viewing booths in adult-oriented establishments and sexually oriented businesses as a means of

controlling and preventing the spread of sexual and communicable diseases, public and unhealthy sexual activities, and unlawful sexual conduct in such booths." As the court stated above, this last concern is not at issue in this case.

Section 2 of the act is its definitional section. (Section 1 merely states how the act amends Tennessee Code Annotated.) A key definition is in subsection (4) of this section, in which "adult-oriented establishment" is defined as

> any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominant stock or trade, sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults.

"Adult-oriented establishment" is further defined to include, but not be limited to, an adult book store, which is defined as a business which has as its principal or predominant stock or trade books, magazines or other periodicals, and which offers commercially one or more of three listed kinds of material: sexually oriented material to be viewed on the premises by the use of a movie machine or slide projector, such material which has a substantial portion of its contents devoted to pictures of sadism, masochism, or bestiality, and such material which has as its principal theme the depiction (the adjective "pictorial" is not used here) of

sexuality in relation to children who are or appear to be less than 18 years of age. The language of this portion of section 2(4) creates the intriguing problem that an establishment the principal business of which is to sell sexually explicit books and periodicals and to rent sexually explicit videocassettes to be viewed by patrons off, but not on, the business premises, and which does not sell or rent any material which might be classified as depicting sadism, masochism, bestiality, or child pornography, is not an adult book store for the purposes of the act. However, the fact that the main definition of adult-oriented establishment is stated to include, but not to be limited to, adult book stores, adult shows, adult peep shows, and adult motion picture theatres as defined suggests that such a book store, while not a book store for the purposes of the act, would nevertheless be an adult-oriented establishment for its purposes. In this regard, it is important to note the broad definition in section 2(10) of the act of "sexually-oriented material":

> any book, article, magazine, publication or written matter of any kind, drawing, etching, painting, photograph, motion picture film or sound recording, which depicts sexual activity, actual or simulated, involving human beings or human beings and animals, or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals in a discernibly turgid state, even if completely covered.

The key provision of the act, as far as this plaintiff is concerned, is section 3. In its subsection (a), this section

prohibits adult-oriented establishments from opening before 8 a.m. Monday through Saturday, from closing after midnight Monday through Saturday, and from being open on any Sunday or legal holiday as designated in Tennessee Code Annotated. In subsection (b), section 3 authorizes local ordinances, resolutions or private acts which impose even more restrictive business hours on such establishments.

Section 4 of the act deals with prevention of the use of private booths, stalls, or partitioned portions of rooms for sexual activity. As stated above, this section has no applicability to the plaintiff's business, and so is not in issue here. Section 5 specifies the criminal penalties for violations of the act.

Section 6 of the act states an exception to the scope of section 3, the section concerning hours of operation:

> The opening and closing time limitations placed on adult-oriented establishments in Section 3 of this act shall not apply to an establishment or the portion thereof which offers only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting.

"Adult cabaret" is defined in section 2(2) of the act to mean "a cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers."

The last section of the act, section 7, states that it is not exclusive or preemptive legislation, so that political subdivisions in Tennessee may impose on adult-oriented establishments "other lawful and reasonable restrictions, regulations, licensing, zoning and other civil or administrative provisions concerning the location, configuration, code compliance or other business operations or requirements of adult-oriented establishments and sexually oriented businesses."

In its complaint filed in this civil action, the plaintiff says that it "operates a bookstore and video store with access restricted to adults only," and that it "does not operate booths, stalls, or partitioned portions of a room or individual rooms for the viewing of motion pictures or other forms of entertainment having doors, curtains or portal partitions." The plaintiff says that its hours of operation would be curtailed if the act were enforced against it, and so prays for, among other forms of relief, an injunction.

The plaintiff submitted in support of its motion for a preliminary injunction the affidavit of one of its attorneys, Joseph J. Levitt, Jr. In his affidavit, Mr. Levitt reports that there are in Knox County four nightclubs in which topless female entertainers perform, and that these nightclubs are generally open past midnight and on Sundays and holidays. This evidence is offered to highlight the distinction drawn by section 6 of the act between adult-oriented establishments governed by the act and clubs which offer "live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting." The plaintiff argues that the distinction violates its right to equal protection under the law.

Mr. Levitt also reports in his affidavit that many businesses in Knox County which are engaged mainly in renting videocassettes to be viewed by patrons at home offer sexually oriented videocassettes for rent. Mr. Levitt defines sexually oriented videocassettes as depicting "actual or simulated sexual activities and the exhibition of anatomical areas listed in the Tennessee statute such as buttocks and female breasts." He reports that each videocassette rental store which he visited offers sexually oriented videocassettes in a separate room, and that each of some of these establishments had 500 or more such videocassettes for rent, while each of the others had "several hundred."

Every videocassette rental store which Mr. Levitt visited was open on Sunday, July 16, 1995, and every one had regular Sunday hours. As is stated above, the act, in section 3(a), prohibits adult-oriented establishments from being open to do business on Sundays. Because of the phrase "or portion thereof" in the definition of "adult-oriented establishment" in section 2(3) of the act, it might be argued that the separate rooms in the videocassette rental stores which Mr. Levitt visited are subject to the act's closing hours requirements. It might also be argued, however, that the presence of such a room in a rental store renders the entire store subject to the closing hours requirements.

Whether a videocassette rental establishment, be it a self-contained store or a separate room in such a store, is subject to the act's closing hours requirements depends in part, as the court's review of the act above indicates, on whether the establishment offers sexually oriented material "as its principal or predominant stock or trade." This phrase

is not defined in the act, leaving open such questions as whether "principal or predominant" is determined by reference to the percentage of gross sales accounted for by sales and rentals of sexually oriented material, or whether it is determined by comparing the number of sexually oriented videocassettes and imprints offered for sale or rental to the total number of titles stocked. At the hearing before the court, counsel could not say definitively whether an establishment engaged solely in the business of renting videocassettes for off-premises viewing could avoid the act's requirements by making certain that 50% plus one of its inventory of videocassettes is not sexually oriented.

The parties do not dispute the applicable analysis for consideration of an application for an injunction:

> When examining the appellees' motion for preliminary injunctive relief, the district court was required to balance the following four factors:
>
> 1) Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
>
> 2) Whether the plaintiff has shown irreparable injury;
>
> 3) Whether the issuance of a preliminary injunction would

cause substantial harm to others;

4) Whether the public interest would be served by issuing a preliminary injunction.

Newsom v. Norris, 888 F.2d 371, 373 (6th Cir. 1989) (citation omitted).

IRREPARABLE HARM

The court will consider the second factor first. It is important to remember that this is not a case concerning obscenity. Imposition of the act's requirements does not depend on any finding of obscenity, legislative or judicial, and there has not been made by any governmental authority any determination that any item offered for sale or for rent by the plaintiff is obscene. Non-obscene adult pornography is protected speech under the First Amendment to the United States Constitution. *United States v. Brown*, 25 F.3d 307, 309 (6th Cir.), *cert. denied*, ____ U.S. ____ [115 S. Ct. 640] (1994).

Because the plaintiff in this lawsuit engages in speech protected by the First Amendment, the criterion of irreparable harm is established in this case. Enforcement of the act will obviously curtail the number of hours during which the plaintiff may sell and rent the material which is its stock in trade, and so will necessarily interfere with its exercise of the freedom of speech. "[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to

justify injunctive relief." *Newsom v. Norris, supra*, 888 F.2d at 378. This is true whether the infringement consists of direct penalization or of incidental inhibition. *Id.* It is also true regardless of whether the plaintiff's speech is intended as a money-making venture. *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1078-79 (6th Cir. 1994).

The court has considered the defendants' arguments that there is no showing of irreparable harm in this case, and has found these arguments wanting. In particular, the court rejects any argument that the plaintiff must await criminal prosecution under the act to make the arguments it makes here. *Compare Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

Concluding that the plaintiff has established irreparable harm in this case depends, however, on a showing of substantial likelihood of success on the merits, for it assumes that the plaintiff has shown an infringement of the freedom of speech, as opposed to a permissible time, place, or manner regulation of its speech. This has been these parties' main battleground in this case, to which the court must direct most of its attention.

LIKELIHOOD OF SUCCESS ON THE MERITS

Litigation and decision-making concerning regulation of speech of the kind targeted by the act are not made easier by the fragmented and sometimes inconsistent appellate decisions in the First Amendment area in recent years. In *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir.

1994), the Court of Appeals for the Sixth Circuit took great pains to parse the Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In *Barnes*, the issue was the legitimacy of a State law prohibiting public nudity, which had the effect of requiring female dancers in nightclubs to wear pasties and G-strings. The Supreme Court upheld Indiana's public indecency statute against the First Amendment attack. In an opinion in which Justices O'Connor and Kennedy joined, Chief Justice Rehnquist agreed that nude dancing was expressive conduct "marginally" protected by the freedom of speech, but stated that the public indecency statute was a justified restriction of such speech premised on a substantial governmental interest in protecting order and morality. The Chief Justice wrote that the statute under attack was content-neutral, *i.e.*, unrelated to the suppression of free expression, because it prohibited public nudity generally, and was not directed at nude dancing in particular.

Concurring in the court's judgment in *Barnes v. Glen Theatre*, Justice Scalia wrote that because the Indiana statute prohibited public nudity generally, and therefore did not restrict free expression, no First Amendment issue was presented.

Justice Souter's separate concurrence created a majority in the case. Justice Souter, however, was not willing to agree with the Chief Justice and Justices O'Connor and Kennedy that a State's interest in morality is a sufficient justification for the restriction of expressive conduct such as nude dancing. Instead, he premised his upholding of the Indiana public indecency statute on the State's interest in combatting such perceived secondary effects of adult

entertainment establishments as prostitution, sexual assault, and other criminal activity.

In *Triplett Grille, supra*, a panel of the court of appeals for this circuit applied existing law concerning how to construe a decision of the Supreme Court when there is no rationale for the decision which is shared by a majority of the justices. Applying this law, the court of appeals concluded that Justice Souter's opinion provides the controlling rationale for the *Barnes v. Glen Theatre* decision, because it states the narrowest ground for the Supreme Court's judgment of reversal in that case.[1]

In *Triplett Grille*, a club which presented nude dancing performances challenged an ordinance which prohibited all nudity in public places. The court of appeals, reviewing a grant of an injunction in the club's favor, followed the Supreme Court's teaching in *Barnes v. Glen Theatre* that the constitutionality of such an ordinance must be considered in accordance with the four-part test established in *United States v. O'Brien*, 391 F.2d 367 (1968): the regulation must be within the power of the promulgating government, it must further an important or substantial governmental interest, the governmental interest must be unrelated to the suppression of free expression, and the restriction of the freedom of speech worked by the regulation must be no greater than what is needed to further the governmental

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[1] This court notes the irony that the ruling case law in this area, at least in this judicial circuit, is derived from an opinion of one justice in which no other justice joined.

interest which justifies the regulation. The court of appeals, applying the teaching of Justice Souter's opinion in *Barnes v. Glen Theatre*, held that affirmative evidence of a motivation to combat the secondary effects of adult entertainment establishments is not required; a municipality or county defending a public indecency ordinance, or a State defending such a statute, need only show that the ordinance or legislation will have the effect of curtailing such secondary effects.

Unlike in *Barnes v. Glen Theatre*, however, *see* 501 U.S. at 585 n.2 (Souter, J., concurring), in *Triplett Grille*, the issue of overbreadth was squarely presented to the court, and it was on this ground that the court of appeals upheld the district court's injunction against the City of Akron's enforcement of its ordinance. Noting that the overbreadth doctrine in First Amendment cases permits a plaintiff subject to regulation by the challenged law to argue its facial invalidity, to prevent the chilling of others' protected free speech, the court of appeals held,

> The Akron public indecency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes. . . Because the City

> failed to present evidence linking expressive nudity in "high-culture" entertainment to harmful secondary effects, we conclude that the ordinance infringes speech protected by the First Amendment.

Triplett Grille, Inc. v. City of Akron, supra, 40 F.3d at 136 (citation omitted) (footnote omitted). Because "federal courts do not rewrite statutes to create constitutionality," *id.* (citation omitted), the court of appeals did not attempt to save the City of Akron's pubic indecency ordinance by imposing a limiting construction on it.

In a case more similar to the one at bar, *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), the plaintiffs, including the owner of adult bookstores, challenged a Memphis ordinance which created licensing and zoning requirements applicable to sexually oriented businesses. The plaintiffs in *East Brooks Books* succeeded in having struck down an overbroad shareholder disclosure requirement in the ordinance, and a vague provision which, by requiring applicants and permittees to show operation of their businesses in a peaceful and law-abiding manner, vested too much discretion in the chief of police services to deny or suspend permits to operate sexually oriented businesses.

In a portion of the court of appeals' ruling in *East Brooks Books* pertinent to issues in the case at bar, the court agreed with the defendant City of Memphis that the ordinance in issue was content-neutral. Citing authorities including *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *United States v. O'Brien, supra*, the court of appeals stated

that a regulation, such as a zoning ordinance, aimed at the secondary effects of adult entertainment establishments, as opposed to the contents of the entertainments offered, should be considered as a content-neutral time, place, or manner restriction. "The ordinance does not attempt to ban [sexually oriented] businesses, nor does it pass judgment on the content of the products sold or entertainment provided by sexually oriented businesses." *East Brooks Books, Inc. v. City of Memphis, supra*, 48 F.3d at 226. Applying the four-part *United States v. O'Brien* analysis, *see supra*, the court in *East Brooks Books* indicated that in almost all cases, such content-neutral regulation will be found to be within the constitutional power of the promulgating government, to further a substantial governmental interest, and to further a governmental interest unrelated to the suppression of free expression, leaving for litigation the issue whether the incidental burden imposed by the regulation on the freedom of speech is no greater than what is necessary to further the substantial governmental interest which justifies the regulation.

Only in a universe peopled by judges and lawyers may one assert with seriousness that legislation like the act in issue here is content-neutral, at least in any broad sense. Clairvoyance is not required to see that the Tennessee General Assembly searched for some way to make economic life harder on businesses like the plaintiff's, and that the political reasons for this have much to do with aversion on the part of some voters to the contents of the material offered for sale and rental by such businesses. Nevertheless, the precedents reviewed above compel this court to find the act content-neutral, taking into account such factors as the act's stated

purpose of combatting secondary effects of adult-oriented establishments, and the act's broad definition of such establishments, which refers to the types of materials offered for sale and rental by the regulated establishments in fairly general terms.

In short, applying the *United States v. O'Brien, supra*, factors, the act was clearly within the power of the Tennessee General Assembly to enact; after *Barnes v. Glen Theatre, supra*, and the interpretation of *Barnes in-Triplett Grille, supra*, the stated secondary effects of adult-oriented establishments must be accepted, even without affirmative evidence, as objects of a "substantial governmental interest;" and the General Assembly's interest in reducing or eliminating these secondary effects must be classed as a "governmental interest unrelated to the suppression of free expression."[2] Are the burdens imposed on the plaintiff's speech, and specifically, the act's closing hours requirements, no greater than what is necessary to further Tennessee's

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[2] Dissenting in *Ward v. Rock against Racism*, 491 U.S. 781 (1989), the late Justice Marshall warned that using the Supreme Court's analysis in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in cases not dealing with "the unique circumstances" of businesses offering sexually explicit materials would "encourage widespread official censorship." *Ward v. Rock against Racism; supra*, 491 U.S. at 804 n.1 (Marshall, J., dissenting). Even though the case at bar deals directly with the issue of regulation of businesses offering sexually explicit materials, it proves the validity of Justice Marshall's concern. Justifications formerly used to *zone* such businesses are now advanced with equal force to *close* these businesses during certain hours of each day.

interest in regulating these secondary effects?

This manner of phrasing the fourth issue to be decided under *United States v. O'Brien, supra*, is rendered dubious by the later decision in *Ward v. Rock against Racism*, 491 U.S. 781 (1989). "Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock against Racism, supra*, 491 U.S. at 798 (footnote omitted). This means, according to the majority in *Ward v. Rock against Racism*, that if the regulation of speech under scrutiny promotes a substantial governmental interest that would be achieved less effectively in the absence of the regulation, "narrow tailoring" sufficient to pass constitutional scrutiny may be found. However, "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799 (footnote omitted).

Applying even this weakened version of the fourth *O'Brien* factor, however, the court finds that the act imposes burdens so much greater than what is necessary to achieve the act's purpose, to regulate the secondary effects of establishments like the plaintiff's, that the court must find that the plaintiff has shown a substantial likelihood of success on the merits, so as to justify a preliminary injunction against enforcement of the act. Put simply, the difference between imposing zoning restrictions or requiring dancers to wear minimal clothing, on the one hand, and, on the other, requiring an establishment concededly engaged in purveying

certain forms of protected speech to close its doors at times dictated by the State (and possibly also by a local government) is the difference between regulation and infringement. The act does not "leave open ample alternative channels of communication," *Ward v. Rock against Racism, supra*, 491 U.S. at 802, during the hours of required closing; it simply deprives the plaintiff and others engaged in similar enterprises of channels of communication, measured in units of time, which existed before the act.

The act's closing hours requirements far exceed what is necessary to further Tennessee's legitimate interest in regulating the secondary effects of adult-oriented establishments. First, the connection between this substantial governmental interest and the closing hours requirements is tenuous. The act does not offer any explanation why the perceived secondary effects which motivated the Tennessee General Assembly are not also present during the hours during which adult-oriented establishments are permitted to remain open. To the extent that these secondary effects are caused by the *presence* of adult-oriented establishments, as opposed to their actual conduct of business, it is difficult to see how mandated closing hours will eliminate or even reduce these secondary effects.

Second, many of the secondary effects recited in the act's preamble are already punishable as crimes. The 10th paragraph of the act's preamble beginning with "WHEREAS" lists as secondary effects prostitution, pandering, unprotected or indiscriminate sexual conduct and masturbation, distribution of obscene materials and child pornography, possession and sale of controlled substances, violent crimes

against persons, property crimes, and exposing minors to harmful materials. The Tennessee General Assembly has acted to combat these effects directly. *See* Tennessee Code Annotated § 39-13-513 (prostitution); § 39-13-515 (promoting prostitution); § 39-13-511 (indecent exposure); §§ 3917-901 through -920 (obscenity); §§ 39-17-1001 through -1007 (sexual exploitation of children); §§ 39-17-401 through -429 (drugs); Title 39, ch. 13 (offenses against person); Title 39, ch. 14 (offenses against property); and § 39-15-401 (child abuse and neglect). While the legislature is not limited to criminalization as the sole means to address its legitimate social welfare concerns, the fact that the act suppresses (at least during certain hours) constitutionally protected expression for the purpose of addressing conduct on the part of persons other than the regulated "speakers" and which has already been declared criminal weighs against finding the act necessary to further the legislature's declared purpose.

Third, other means exist to further the legislative purpose of regulating the secondary effects of adult-oriented establishments, and these other means accomplish this purpose without dictating the periods of time during which "speakers" like the plaintiff may engage in protected (albeit commercial and even pornographic) speech. Zoning techniques are available to States, counties, and municipalities, especially after the decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[3] As the act's

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[3] As is stated above, the act, in its section 7, states specifically that it does not preempt or prevent the enactment of any other laws, including zoning laws.

preamble states, courts, including another division of this one[4], "have upheld restrictions on the configuration and viewability of the peep show motion picture viewing booths in adult-oriented establishments and sexually oriented businesses." Another conceivable legislative mandate to address the secondary effects of adult-oriented establishments might require a certain minimum intensity of lighting around such establishments and in their parking lots.

In noting less restrictive means by which to accomplish the act's purposes, the court is mindful that judicial authority to weigh the validity of time, place, and manner limitations on free expression does not constitute authority to legislate. *See Clark v. Community for Creative*

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[4] *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486 (E.D. Tenn. 1986) (*per* Edgar, U.S.D.J.). The court in *Broadway Books* also upheld an hours-of-operation requirement in the ordinance before it for consideration, but did so in a single, conclusory paragraph. As is obvious from the body of this memorandum opinion, the undersigned respectfully disagrees with the conclusion on this latter point stated in *Broadway Books*.

This court addressed an earlier Tennessee statute regulating adult-oriented establishments in *Brothers Three Enterprises, Inc., et al. v. Knox County, Tennessee, et al.*, no. CIV-3-89-035, E.D. Tenn., memorandum and order filed Jan. 27, 1989 (*per* Jordan, U.S.D.J.). However, *Brothers Three* dealt mainly with the licensing scheme in that ordinance, and, in spite of the plaintiff's reliance on it here, it provides little guidance in deciding the issues presented. Furthermore, the authority of *Brothers Three* is perhaps diminished by the subsequent rulings in *Barnes v. Glen Theatre, Inc., supra*, and *Triplett Grille, Inc. v. City of Akron, supra*.

Non-violence, 468 U.S. 288, 299 (1984). Considering that the act positively prohibits commercial expression by certain "speakers" during certain hours and on certain days, however, the court concludes that the fourth *United States v. O'Brien, supra*, factor, however weakened by more recent Supreme Court case law, supports finding a substantial likelihood of success on the merits here. The act's invitation, in its section 3(b), to local governments to impose even more restrictive closing hours requirements on adult-oriented establishments is indicative of a legislative intent to "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock against Racism, supra*, 491 U.S. at 799.

In light of the body of law discussed above, the court respectfully disagrees with those courts which have upheld closing-hours requirements after limited consideration of them. *See Broadway Books, Inc. v. Roberts, supra* note 4. In *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1577 (M.D. Tenn. 1989), District Judge Higgins upheld an hours-of-operation provision in a similar ordinance with only brief discussion, noting "the difficulty of policing and enforcing the ordinance in the wee hours of the morning." In that case, the ordinance permitted adult-oriented establishments to operate 19 hours per day six days a week, and 15 hours each Sunday. *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 10 F.3d 123 (3d Cir. 1993), on which the defendants rely heavily, contains a somewhat more extensive discussion of the constitutionality of closing-hours requirements, but it is authority from another circuit, not binding on this court.

Even if the court's analysis of the act under the four-part *O'Brien* test does not withstand appellate review, however, the court finds that the plaintiff has shown a substantial likelihood of success on the merits on the basis of the act's overbreadth. The court has reviewed above in this memorandum opinion recent decisions concerning overbreadth by the United States Court of Appeals for the Sixth Circuit in *Triplett Grille, Inc. v. City of Akron, supra*, and *East Brooks Books, Inc. v. City of Memphis, supra*. In *Ellwest Stereo Theater, supra*, District Judge Higgins enjoined enforcement of the ordinance in issue after finding many of its provisions overbroad, stating the applicable law as follows:

> [L]aws which are overbroad, threatening the exercise of First Amendment rights, are unconstitutional. The Supreme Court has held that a government's purpose, no matter how praiseworthy, cannot be pursued by means that stifle broad fundamental liberties when the end can be more narrowly achieved. A legislature must achieve its goal by means which have a less drastic impact on the continued vitality of First Amendment freedoms. Therefore, laws that impose restrictions so broad as to create a "chilling effect" which would necessarily curtail the availability of non-obscene expression because of concern over violating the laws are unconstitutional.

Ellwest Stereo Theater, Inc. v. Boner, supra, 718 F. Supp. at 1561 (citations omitted).

Applying this body of law to the act, the court finds the act unconstitutionally overbroad. The act's definitions of "adult oriented establishment" and of "sexually-oriented material" are so broad that its closing hours requirements would apply to an establishment engaged in the sale of printed texts, without illustrations, concerning sexual matters. As with the ban on nudity in issue in *Triplett Grille, supra*, the act makes no provision for materials which concern sexual matters but which nevertheless have literary, artistic, or political value. As every student of First Amendment jurisprudence knows, overbroad statutes (or overbroad interpretations of laws) seem inevitably to invite some officials to attempt to censor works of lasting value. *See, e.g., Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964) (*per curiam*) (reversing a State-court decision upholding a determination that Henry Miller's *Tropic of Cancer* was obscene).

The inclusion of the word "paraphernalia" in the act's definition of "adult-oriented establishment" calls into question whether a shop which has as its principal or predominant stock or trade the sale of lingerie is subject to the act.[5] In the definition of "sexually-oriented material," "drawing, etching, painting, photograph, motion picture film or sound recording,

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[5] "Paraphernalia" is defined as "equipment, apparatus, or furnishing used in or necessary for a particular activity," but also as "personal belongings" THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabridged). It is interesting that the etymology of the word includes the Medieval Latin *paraphernalia bona*, which refers to a bride's goods beyond her dowry.

which depicts sexual activity" might be held to include Gustav Klimt's "The Kiss," but not Auguste Rodin's sculpture concerning the same subject (although it might include a drawing, etching, etc. of the sculpture).

The problem mentioned above in this opinion with the phrase "as its principal or predominant stock or trade" in the definition of "adult-oriented establishment" adds to the overbreadth of the act, because it creates the potential for regulation of establishments which have nothing to do with causing the secondary effects which the Tennessee General Assembly intended to address by enacting the act. As Mr. Levitt's research has highlighted, many businesses which are engaged in renting videocassettes for viewing off premises offer some sexually explicit titles. It seems likely that these businesses have little or nothing to do with causing the secondary effects listed in the act's preamble, and that the legislature did not intend to regulate them, but because it is unclear from the act how one determines the point at which a videocassette rental business becomes an adult-oriented establishment (or even how such a business becomes an adult-oriented establishment, whether by gross sales volume, percentage of titles stocked, or some other means), the scope of the act might be held to reach businesses not customarily thought of as adult-oriented establishments. This ambiguity points out what, besides the chilling effect, is dangerous about an overbroad regulation of protected speech: it leaves too much discretion to law enforcement officials.

The defendants' argument that this plaintiff cannot raise the issue of overbreadth because its establishment is "clearly" within the valid scope of the act goes too far, for it

would eliminate the doctrine of overbreadth. As the court stated above, citing the court of appeals' decision in *Triplett Grille, supra*, the doctrine permits one subject to regulation by a challenged law to argue the law's facial invalidity, because of the constitutional importance of preventing chilling of others' protected free speech. Furthermore, because of the act's vagueness problems, addressed below in this opinion, this court is not prepared to find that any establishment is "clearly" subject to the act.

The case law on which the defendants rely provides little guidance in this area. Overbreadth in the context of a closing hours requirement was not considered in this district court's decision in *Broadway Books, Inc. v. Roberts, supra* note 4, or in the decision of the Court of Appeals for the Fifth Circuit on which Judge Edgar relied in *Broadway Books, Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986). In *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware, supra*, there is little discussion of overbreadth, perhaps because the plaintiff owner of an adult-oriented establishment in that case made the uniquely narrow argument that the statute there in issue was overbroad because his establishment was located where it could not be the cause in a residential neighborhood of the secondary effects of late-night noise, crime, and sexually offensive materials and conduct.

The act is also unconstitutionally vague. In *Ellwest Stereo Theater, Inc. v. Boner, supra*, District Judge Higgins held that the ordinance before him was impermissibly vague in its definition of "adult bookstore", which defined the term to mean "an establishment having as a substantial or

significant portion of its stock or trade" sexually explicit material. The judge noted that the director of personnel services of the metropolitan health department, who was designated as the individual with knowledge of the health department's operation, management, and enforcement of the ordinance in issue, was unable to state a precise meaning of "substantial or significant", testifying at one point that the ordinance would apply to a bookstore with less than 50% of its inventory in adult-oriented titles. Judge Higgins' statement concerning this applies equally well to counsel's inability at oral argument before this court to assign a precise meaning to "principal or predominant":

> The Court finds it extremely revealing that a representative of the Health Department, the agency charged with administering this ordinance, was unable to determine under the ordinance which establishments it was entitled to regulate. Clearly, if the regulating authority cannot determine the establishments which are subject to its authority, the establishments themselves cannot be expected to determine whether they need to be licensed or not.

Ellwest Stereo Theater, Inc. v. Boner, supra, 718 F. Supp. at 1581.

The vagueness of the act is compounded by the inclusion in the definition of "adult-oriented establishment" of the words "or portion thereof". These words raise more questions than they answer. How does one determine the boundaries of a portion of an establishment in order to

determine the nature of the principal or predominant stock or trade of that portion? If the principal or predominant stock or trade of a portion of an establishment is sexually-oriented material, is that portion subject to the act, or is the entire establishment subject to the act? Does the answer to the preceding question depend on the relationship of the portion to the entire establishment? Is this relationship determined by the percentage of total titles stocked, by the gross sales accounted for by sales or rentals of sexually-oriented material, or by some other method or methods?

It can be seen that the vagueness of the act results in the twin problems of the act providing little guidance to those who might be regulated by it, and of it allowing too much discretion to those charged with its enforcement. This constitutionally impermissible vagueness alone provides the plaintiff with a showing of substantial likelihood of success on the merits. Combined with the act's overbreadth and the fact that its reach extends far beyond what is necessary to further the State's legitimate interest in regulating the secondary effects described in the act's preamble, it establishes at this stage of this litigation the second criterion for issuing a preliminary injunction.

SUBSTANTIAL HARM TO OTHERS
AND
THE PUBLIC INTEREST

In its memorandum and order filed in *Brothers Three Enterprises*, this court addressed these factors in terms equally applicable to the act in issue here:

Independently of the Act, the obscenity statutes and health statutes and regulations of the State of Tennessee and Knox County would allow the defendants to enforce the prohibition against illegal dissemination of specific obscene materials and to remedy any health hazards in adult-oriented establishments. The defendants are not left without any enforcement authority and are free to exercise the authority established by such statutes and ordinances that existed prior to the adoption of the Act. No other possibility of harm to others has been shown to the Court and the State's interest in enforcing obscenity and health laws will not be impaired. A preliminary injunction will do no more than restore the pre-Act status quo.

* * *

The Court recognizes that the public certainly has an interest in the enforcement of obscenity [and] health statutes. . . Nevertheless, the public also has a vital interest in the free flow of expression. Although some forms of expression may be unpopular or even obnoxious to the community, the Constitution is intended to protect even unpopular forms of expression. As Justice Stewart remarked in his dissent in *Young v. American Mini Theaters, Inc.*, "the consequences of rigorously enforcing the guarantees of the First

> Amendment are frequently unpleasant." The public's most fundamental interest is obviously served by preserving the rule of law embodied in constitutional government.

Brothers Three Enterprises, Inc., et al. v. Knox County, Tennessee, et al., supra, memorandum and order at 14-16 (citations omitted).

As the court noted above, many, if not all, of the secondary effects listed in the act's preamble are addressed by existing Tennessee criminal law. The additional regulation of these effects which might be accomplished by the act is outweighed by far by the infringement of First Amendment rights which the act would work.

CONCLUSION

The court is unable to construe the act, or to elide any portion of it, so as to render it not subject to constitutional challenge. As the court of appeals for this circuit held in *Triplett Grille, supra*, federal courts should not rewrite State statutes to create constitutionality. Furthermore, Tennessee law on this subject would prevent judicial editing of the act in this case. *See Vollmer v. City of Memphis*, 730 S.W.2d 619, 622 (1987), *on subsequent appeal*, 792 S.W.2d 446 (Tenn. 1990).

The rulings stated in this memorandum opinion render it unnecessary to address the equal protection arguments raised by the plaintiff.

The court concludes that the plaintiff has established the criteria for the issuance of a preliminary injunction in this case. The court will accordingly grant the plaintiff's motion, and enjoin enforcement of the act pending further litigation.

Nothing in this memorandum opinion should be read as a judicial endorsement of the kind of material which the plaintiff purveys in commerce. Just as the First Amendment guarantees not only "free thought for those who agree with us but freedom for the thought that we hate," *United States v. Schwimmer*, 279 U.S. 644, ____ (1929) (Holmes, J., dissenting), it provides some protection for material which to many is contemptible.

ENTER:

/s/ _____
Leon Jordan
United States District Judge

APPENDIX G

PUBLIC CHAPTER NO. 421
TENNESSEE PUBLIC ACTS OF 1995
WITH PREAMBLE, CODIFIED AS
TENNESSEE CODE ANNOTATED
7-51-1401 THROUGH 7-51-1406

SENATE BILL NO. 226

By Rice, Miller, Person, Carter, Fowler, Elsea, Crowe, Gilbert, Jordan, McNally

Substituted for: House Bill No. 890

By Burchett, Newton, Dunn, Boyer, Hassell, Halterman Harwell, Haley, Shirley, Walley, Joyce, Jackson, Whitson, Byrd

AN ACT To amend Tennessee Code Annotated, Title 7, Chapter 51, relative to adult-oriented establishments.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

WHEREAS, Many adult-oriented establishments exist where enclosed booths, stalls or cubicles and entertainment are provided to persons for a fee for the purpose of viewing adult entertainment; and

WHEREAS, Studies performed in a substantial number of communities around the country indicate that such

closed booths, stalls, or cubicles have been used by patrons, clients or customers of such adult-oriented establishments for the purpose of engaging anonymously in sexual acts which cause blood, semen, urine or excrement to be deposited on the floors an/or walls of such enclosures; and

WHEREAS, These studies also found that closed booth activities are likely to foster a pattern of conduct inimical to the public health; that enclosed booth encourage illegal and unsanitary sexual activity; and per se present a health risk; and

WHEREAS, The health risks include the possible unchecked spread of the AIDS virus, hepatitis-B virus and other sexually transmitted diseases because tracking of potentially infected parties is not possible given the anonymity of the sexual encounter; and

WHEREAS, Adult-oriented establishments, also known as sexually oriented businesses, require special supervision from public safety and health agencies in order to protect and preserve the health, safety and welfare of the patrons of such businesses, as well as citizens of the state and of the city and county in which they are located; and

WHEREAS, Extensive reviews have been conducted of land use studies concerning the secondary effects of adult-oriented establishments and sexually oriented businesses in other cities, including, but not limited to, Garden Grove, California (1991); Phoenix, Arizona (1986); Minneapolis, Minnesota (1980); Houston, Texas (1983); Indianapolis, Indiana (1984); Amarillo, Texas (1977); City of Los Angeles,

California (1977); Cleveland, Ohio (1977); Austin, Texas (1986); Seattle, Washington (1989); Oklahoma City (1986); Beaumont, Texas (1982); and Whittier, California (1978); and considered the experience of citizens and public officials in this state; and

WHEREAS, From review of other cities' studies and evidence from this state, there is convincing documented evidence that adult-oriented establishments, because of their very nature, have a deleterious effect on existing businesses around them, the surrounding residential areas, and the public at large, causing, among other adverse secondary effects, increased crime, downgrading of property values and spread of sexually transmitted and communicable diseases; and

WHEREAS, It is recognized that adult-oriented establishments, due to their nature, have serious objectionable operational characteristics, including location, hours of operation and physical layout of the establishment, thereby contributing to crime, disease lower property values, urban blight and downgrading of the quality of life; and

WHEREAS, It is recognized that adult-oriented establishments are frequently used for unlawful and/or dangerous sexual activities, including prostitution, indecent exposure and public or indiscriminate masturbation and sexual conduct; and

WHEREAS, Increased crime and unhealthful conduct tend to accompany, concentrate around and be aggravated by adult-oriented establishments, including, but not limited to, prostitution, pandering, unprotected or indiscriminate sexual

conduct and masturbation, distribution of obscene materials and child pornography, possession and sale of controlled substances, violent crimes against persons, property crimes and exposing minors to harmful materials; and

WHEREAS, Concern over sexually transmitted diseases, including AIDS, is a legitimate health concern of the state which demands reasonable regulations of adult-oriented establishments in order to protect the health and well-being of the citizens; and

WHEREAS, The experience of other states and cities demonstrate that reasonable restrictions on closing hours, as contained in this act, are beneficial and necessary as a means of reducing and curtailing deleterious secondary effects of adult-oriented establishments, including crime, noise, traffic congestion, police response time and efforts, parking problems, sexual disease, sexual activity and discarded pornographic material on neighboring properties and whereas, the Supreme Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50-52 (1986), held that states and cities may rely on the experiences of other communities to prevent or reduce the attendant harmful secondary effects of adult-oriented establishments and sexually oriented businesses, rather than await the impact of such effects, and whereas, several courts have upheld similar restrictions on hours of operations of such establishments and businesses, including: *Mitchell v. Commission on Adult Entertainment*, 802 F. Supp. 1112 (D. Del. 1992), affirmed at 10 F. 3d 123 (3rd Cir. 1993); *Ellwest Stores v. Boner*, 718 f. Supp. 1553, 1577 (M.D. Tenn 1989) (law is difficult to enforce and police in middle of night); *Star Satelite, Inc. v. City of Biloxi*, 779 F.

2d 1074 (5th Cir. 1986); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 491 (E. D. Tenn. 1986) (law furthers legitimate law enforcement purpose), and that, therefore, such restrictions are unlawful and proper to adopt in this state; and

WHEREAS, Several courts have upheld restrictions on the configuration and viewability of the peep show motion picture viewing booths in adult-oriented establishments and sexually oriented businesses as a means of controlling and preventing the spread of sexual and communicable diseases, public and unhealthy sexual activities, and unlawful sexual conduct in such booths, including: *Libra Books, Inc. v. City of Milwaukee*, 818 F. Supp. 263 (E. D. Wisc. 1993); *City News & Novelty v. City of Waukesha*, 487 N.W. 2d 316 (Wisc. App. 1993); *Bamon Corp. v. City of Dayton*, 923 F. 2d 470 (6th Cir 1991); *Movie & Video World v. Board of County Commissioners*, 723 F. Supp. 695 S. D. Fla 1989); *Ellwest Stereo Theatre, Inc. v. Boner*, 718 F. Supp. 1553 (M. D. Tenn. 1989) (Nashville open booth law upheld to prevent prostitution, sexual conduct, diseases); *Berg v. Health and Hospital Corp. of Marion County*, 856 F. 2d 797 (7th Cir. 1988); *FW/PBS, Inc. v. City of Dallas*, 837 F. 2d 1298 (5th Cir. 1988); *Postscript Enterprises v. City of Bridgeton*, 699 F. Supp. 1939 (E. D. Mo. 1988); *Suburban Video, Inc. v. City of Delafield,* 694 F. Supp. 585 (E. D. Wisc. 1988) *Doe v. City of Minneapolis*, 693 F. Supp. 774 (D. Minn. 1988); *Wall distributors, Inc. v. City of Newport News*, 782 F. 2d 1165 (4th Cir. 1986); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 492 (E. D. Tenn. S. D. 1986) (Chattanooga open booth law upheld); *Moody v. Board of County Commissioners*, 697 P. 2d 1310 (Kan. 1986); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F. 2d 1243 (9th Cir. 1982);

EWAP, Inc. v. City of Los Angeles, 158 Cal. Rptr. 579 (Cal. App. 1979), and that, therefore, such restrictions are lawful and proper to adopt in this state; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 7, Chapter 51, is amended by adding Sections 2 through 6 of this act as a new, appropriately designated part.

SECTION 2 As used in this part, unless the context otherwise requires:

(1) "Adult" means a person who has attained the age of eighteen (18);

(2) "Adult cabaret" means a cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers;

(3) "Adult entertainment" means any exhibition of any adult-oriented motion picture, live performance, display or dance of any type, which has as a significant or substantial portion of such performance, any actual or simulated performance, any actual or simulated performance of specified sexual activities, including removal of articles of clothing or appearing unclothed;

(4) "Adult-oriented establishment" means any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominant stock or

trade, sexually oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults. The term "adult-oriented establishment" includes but is not limited to:

(A) "Adult book stores", which means any corporation, partnership or business of any kind which has as its principal or predominant stock or trade books, magazines or other periodicals and which offers, sells, provides or rents for a fee:

(i) Any sexually-oriented material which is available for viewing by patrons on the premises by means of the operation of movie machines or slide projectors; or

(ii) Any sexually-oriented material which has a substantial portion of its contents devoted to the pictorial depiction of sadism, masochism or bestiality; or

(iii) Any sexually-oriented material which has as its principal theme the depiction of sexual activity by, or lascivious exhibition of, the uncovered genitals, pubic region or buttocks of children who are or appear to be under the age of eighteen (18);

(B) "Adult shows" or "adult peep shows", which include all adult shows, exhibitions, performances or presentations which contain acts or depictions of specified sexual activities;

(C) "Adult motion picture theatres", which means an enclosed building used for presenting film presentations which are distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities for observation by patrons therein;

(5) "Bestiality" means sexual activity, actual or simulated, between a human being and an animal;

(6) "Masochism" means sexual gratification achieved by a person through, or the association of sexual activity with, submission or subjection to physical pain, suffering, humiliation, torture or death;

(7) "Person" means an individual, partnership, limited partnership, firm, corporation or association;

(8) "Sadism" means sexual gratification achieved through, or the association of sexual activity with, the infliction of physical pain, suffering, humiliation, torture or death upon another person or animal;

(9) "Specified sexual activities" means activities, services or performances that include the following sexual activities and/or the exhibition of the following anatomical areas:

(A) Human genitals in a state of sexual stimulation or arousal;

(B) Acts of human masturbation, sexual intercourse, sodomy, cunnilingus, fellatio or any excretory

function, or representation thereof; or

(C) Fondling or erotic touching of human genitals, public region, buttocks or female breasts;

(10) "Sexually-oriented material" means any book, article, magazine, publication or written matter of any kind, drawing, etching, painting, photograph, motion picture film or sound recording, which depicts sexual activity, actual or simulated, involving human beings or human beings and animals, or which exhibits uncovered human genitals or pubic region in a lewd or lascivious manner or which exhibits human male genitals in a discernibly turgid state, even if completely covered.

SECTION 3. (a) No adult-oriented establishment shall open to do business before eight o'clock a.m. (8:00 a.m.), Monday through Saturday; and no such establishment shall remain open after midnight (12:00 a.m.), Monday through Saturday. No adult-oriented establishment shall be open for business on any Sunday or a legal holiday as designated in Tennessee Code Annotated, Section 15-1-101.

(b) A local ordinance, resolution or private act may establish opening hours for adult-oriented establishments which are later than eight o'clock a.m. (8:00 a.m.) and closing hours which are earlier than midnight (12:00 a.m.), but in no event may such ordinances, resolutions or private acts extend the opening hours to earlier than eight o'clock a.m. (8:00 a.m.) or the closing hours to later than midnight (12:00 a.m.).

SECTION 4. No person shall own, operate, manage, rent, lease or exercise control over any commercial building, structure, premises or portion or part thereof, which is an adult-oriented establishment and which contains:

(1) partitions between subdivisions of a room, portion or part of a building, structure or premises having an aperture which is designed or constructed to facilitate sexual activity between persons on either side of the partition; or

(2) booths, stalls, or partitioned portions of a room or individual rooms, used for the viewing of motion pictures or other forms of entertainment, having doors, curtains or portal partitions, unless such booths, stalls, partitioned portions of a room or individual rooms so used shall have at least one side open to adjacent public rooms so that the area inside is visible to persons in adjacent public rooms. Such areas shall be lighted in a manner that the persons in the areas used for viewing motion pictures or other forms of entertainment are visible from the adjacent public rooms, but such lighting shall not be of such intensity as to prevent the viewing of motion pictures or other offered entertainment.

SECTION 5. A first offense for a violation of this part is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500); and a second or subsequent such offense is a Class A misdemeanor.

SECTION 6. The opening and closing time limitations placed on adult-oriented establishments in Section

3 of this act shall not apply to an establishment or the portion thereof which offers only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting.

SECTION 7. Nothing in this act shall pre-empt or prevent political subdivisions in this state from enacting and enforcing other lawful and reasonable restrictions, regulations, licensing, zoning and other civil or administrative provisions concerning the location, configuration, code compliance or other business operations or requirements of adult-oriented establishments and sexually oriented businesses.

SECTION 8. This act shall take effect July 1, 1995, the public welfare requiring it.

(2)

Supreme Court, U.S.
FILED
AUG 15 2002
OFFICE OF THE CLERK

No. 01-1824

In The

Supreme Court of the United States

RICHLAND BOOKMART, INC.,
D/B/A TOWN AND COUNTRY,

Petitioner,

v.

RANDALL E. NICHOLS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Sixth Circuit correctly hold, applying the intermediate scrutiny test, that the Tennessee Adult-Oriented Establishment Act (1995 Tenn. Pub. Acts, Ch. 421) does not violate the First Amendment, because the Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation of certain types of adult-oriented establishments as a means of reducing deleterious secondary effects?

2. Does the limited exemption from Chapter 421's hours of operation restrictions for certain adult-oriented establishments that offer "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting" violate the Equal Protection Clause?

LIST OF PARTIES

The Petitioner (Plaintiff) is Richland Bookmart, Inc., a corporation authorized to do business in the State of Tennessee, doing business as Town and Country in Knoxville, Tennessee. Respondent Randall E. Nichols is the District Attorney General covering Knox County, Tennessee, who has authority to enforce Chapter 421 against Petitioner. He is sued in his official capacity.

There are no entities to report or list pursuant to Supreme Court Rule 29.6.

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STATEMENT OF THE CASE

Tennessee's Adult-Oriented Establishment Act, enacted as 1994 Tenn. Pub. Acts, Chapter 421 and codified at Tenn. Code Ann. §§ 7-51-1401 – 1406 ("Chapter 421"), makes clear on its face, both in its preamble and body, that the Tennessee legislature intended to address the deleterious secondary effects of types of adult-oriented establishments by two reasonable and independent means: (a) restrictions on the hours of operation of certain adult-oriented establishments and (b) restrictions on the configuration and viewability of booths in adult-oriented establishments. Chapter 421's preamble and legislative history demonstrate that it is intended to address deleterious "secondary effects" on the community from types of adult-oriented establishments, including, but not limited to, "crime, noise, traffic congestion, police response time and efforts, parking problems, sexual disease, sexual activities, and discarded pornographic material on neighboring properties." Chapter 421 preamble, 12th "Whereas" clause (Pet. App. G).

The procedural history of the case is set forth in the Sixth Circuit's decision vacating the district court's injunction and finding that Chapter 421 does not violate the First Amendment, is not unconstitutionally overbroad, and is not unconstitutionally vague, 137 F.3d 435, 437-38 (6th Cir. 1998), *rehearing and suggestion of rehearing en banc denied* (*"Richland Bookmart I"*) (Pet. App. D), and in the Sixth Circuit's decision affirming the judgment of the district court, following remand, that Chapter 421 does not violate the Equal Protection Clause. 278 F.3d 570, 572-74 (6th Cir. 2002) (2-1 decision), *rehearing and suggestion for rehearing en banc denied ("Richland Bookmart II")* (Pet. App. A & B).

Petitioner operates an "adults only" bookstore and/or video store that sells and distributes books and magazines and rents or sells videos consisting of sexually oriented material for off-premises usage. It is an "adult-oriented establishment" under Section 2(4) of Chapter 421. Prior to the effective date of Chapter 421, petitioner filed this action challenging the Act, both facially and as applied, under the First and Fourteenth Amendments to the United States Constitution.[1] Petitioner alleged that the limited exception in Chapter 421's hours of operation restrictions for certain adult-oriented establishments violated the Equal Protection Clause. R. 1, Complaint.[2]

Initially, the district court preliminarily enjoined enforcement of Chapter 421. R. 14, Memorandum Opinion granting preliminary injunction; Pet. App. F. In response to an order of the district court directing respondent to show cause why the preliminary injunction should not be made permanent, respondent submitted as exhibits the three-volume legislative history of Chapter 421. This

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[1] Although petitioner sought to invalidate the entire act, petitioner's adult book and video store does not operate on-premises viewing booths, and petitioner has not challenged the extensive legislative record in this case demonstrating deleterious secondary effects clearly associated with closed on-premises viewing booths (especially the health concerns associated with anonymous and unprotected sexual activity occurring therein). "Open booth" requirements appear to be universally upheld. *See, e.g., Pleasureland Museum, Inc. v. Beutter (Mayor, City of Mishawaka),* 288 F.3d 988, 1003-04 (7th Cir. 2002); *Scope Pictures of Missouri, Inc. v. City of Kansas City,* 140 F.3d 1201, 1204 (8th Cir. 1998); *Mitchell v. Com'n on Adult Entertainment Establishments,* 10 F.3d 123, 139-44 (3rd Cir. 1993); *Bamon Corp. v. City of Dayton,* 923 F.2d 470 (6th Cir. 1991); *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165, 1167 (4th Cir. 1986).

[2] "R. ___" refers to the district court Docket Entry number.

included, as referenced in the preamble of Chapter 421, numerous studies, case law, and information from other jurisdictions regarding secondary effects of adult-oriented establishments that were reviewed by the Act's sponsor and available for review by the legislature. *See* R. 21, Respondent's Response to Show Cause Order ("Show Cause Response"), with exhibits, Vol II, 154-494 (information available from approximately fifteen jurisdictions). Written and oral testimony before the legislature included pictures and graphic descriptions of the unhealthy and unsanitary conditions discovered within Memphis, Tennessee, adult bookstores, the commonplace anonymous solicitations for sexual activities within these establishments, and the serious health and safety concerns documented by health care professionals. *See, e.g.*, R. 21, Show Cause Response, Exhibits, Vol. I (transcript of legislative record), 10-11, 13-18, 21-22, 125-27 & Vol. 3 (written testimony), 495-98, 502-06, 508-17, 532-37, 541-45.

Contrary to petitioner's assertion, petitioner was not denied the opportunity to object to the reasonableness of the Tennessee legislature's reliance on the experience of other jurisdictions, including case law, to support hours of operation restrictions as a reasonable means of addressing deleterious secondary effects. Petitioner replied to respondent's show cause response, provided a newspaper article, submitted an affidavit regarding operating hours of certain business establishments, and attempted to distinguish the studies, case law, and other information related to deleterious secondary effects from other jurisdictions. R. 23 & 24, Petitioner's Reply to Respondent's Show Cause Response, with Affidavit of Arthur R. Anderson. Although

it had the opportunity, petitioner did not introduce expert or other evidence to refute the State's reasonable reliance on the experience of the other jurisdictions. Petitioner never requested from either the district court or the Sixth Circuit the opportunity to conduct discovery or to present proof regarding this issue.

Without reaching the equal protection issue, the district court ordered its preliminary injunction to become a permanent injunction. R. 25 & 26, Memorandum & Order making injunction permanent; Pet. App. E. In *Richland Bookmart I*, the Sixth Circuit held that Chapter 421 was intended by the Tennessee legislature to further the "substantial government interest" of reducing the deleterious secondary effects surrounding adult-oriented establishments. The Sixth Circuit concluded that Chapter 421 should be treated as "content neutral" and should therefore be analyzed under an intermediate scrutiny test as a form of time, place, and manner regulation, like the zoning ordinance in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-52 (1986). *Richland Bookmart I*, 137 F.3d at 438-40. In the Sixth Circuit's view, "the real question [was] one of reasonableness[:]"

> The Tennessee legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation. It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution in the neighborhood at night or the creation of drug "corners" on the surrounding streets. By deterring such behavior, the neighborhood may be able to ward off high vacancy rates, deteriorating store fronts, a blighted appearance and the lowering of property values of homes and shopping areas. Such regulation may prevent the

> bombed-out, boarded-up look of areas invaded by such establishments. At least that is the theory, and it is not unreasonable for legislators to believe it based on evidence from other places.

137 F.3d at 440-41. The court of appeals further emphasized that adult-oriented establishments are still open during many hours during the week and concluded that Chapter 421 "leaves open alternative avenues of communication." *Id.* at 441. The Sixth Circuit concluded that Chapter 421 was neither unconstitutionally overbroad nor vague, and remanded the case to the district court for consideration of the equal protection challenge. *Id.*

Section 6 of Chapter 421 contains a limited exemption for adult-oriented establishments offering "only live, stage adult entertainment in a theatre, adult cabaret, or dinner show type setting" from the Act's "opening and closing time limitations." Previously, in 1994, the legislature had passed Tennessee's Public Indecency Act, Tenn. Code Ann. § 39-13-511, which in part makes it a misdemeanor offense knowingly or intentionally to appear in public in a "state of nudity." Consequently, a performer at a live entertainment adult-oriented establishment has to wear, at a minimum, "pasties" and a "g-string" in order to comply with Tennessee's public indecency law. On remand the district court correctly applied a rational basis test and found that the limited exemption in Section 6 of Chapter 421 does not violate the Equal Protection Clause. R. 56 & 57, Memorandum & Order granting respondent summary judgment; Pet. App. C. The Sixth Circuit affirmed. *Richland Bookmart II,* 278 F.3d at 572-578. The lower courts reasoned that it was not unconstitutional for the Tennessee legislature to take a step-by-step approach in addressing the issue of deleterious secondary effects created by

adult-oriented establishments. Furthermore, there was no allegation or showing of any invidious discrimination on the part of the Tennessee legislature in exempting certain live entertainment establishments from the operating hours restrictions. *Id.* at 574-76.

REASONS FOR DENYING THE PETITION

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE TENNESSEE LEGISLATURE, BASED ON THE EXPERIENCE OF OTHER JURISDICTIONS, REASONABLY RESTRICTED HOURS OF OPERATION AS A CONSTITUTIONAL MEANS OF ADDRESSING DELETERIOUS SECONDARY EFFECTS.

The Sixth Circuit correctly concluded that Chapter 421 serves a substantial governmental interest by reducing the deleterious secondary effects of adult-oriented establishments that is unrelated to the suppression of speech and properly treated the act as "content-neutral." *Richland Bookmart I*, 137 F.3d at 437-41. Nothing in this conclusion conflicts with this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. ___, 122 S.Ct. 1728 (2002).

This Court has not abandoned the intermediate scrutiny test, set forth in *Renton,* 475 U.S. at 46-50, for analyzing the constitutionality of time, place, and manner regulations. This Court continues to adhere to the principle enunciated in *Renton* that a governmental regulation will be upheld as long as it is shown to be designed to serve a substantial government interest and that reasonable alternative avenues of communication remain available. 475 U.S. at 50. The decision of the Sixth Circuit that

Chapter 421 is valid under the intermediate scrutiny test is not in conflict with this Court's clarification of "the standard for determining whether [a regulation] serves a substantial government interest under *Renton*[,]" as set forth in *Alameda Books,* 535 U.S. at ___, 122 S.Ct. at 1733 (plurality opinion). Consistent with the holding in *Alameda Books,* the Sixth Circuit properly found that:

> reducing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhood surrounding adult establishments is a "substantial government interest." The Tennessee Legislature reasonably relied on the experiences of other jurisdictions in restricting the hours of operation.

Richland Bookmart I, 137 F.3d at 440.

The Sixth Circuit, like numerous other circuits, has properly applied the intermediate scrutiny test from *Renton* to uphold hours of operation restrictions as a constitutional time, place, or manner restriction intended to address deleterious secondary effects of adult-oriented establishments. When enacting Chapter 421 the Tennessee legislature relied in part upon the experience of other jurisdictions, including the case law upholding identical or similar hours of operation restrictions. No Circuit has found such reasonable hours of operation restrictions to be unconstitutional. *See, e.g., Richland Bookmart I,* 137 F.3d at 437-41; *Schultz v. City of Cumberland,* 26 F. Supp. 2d 1128, 1145-46 (W.D. Wis. 1998), *aff'd,* 228 F.3d 831, 846 (7th Cir. 2000) (upheld finding that allowing sexually-oriented businesses to operate only 10 a.m. until midnight Monday through Saturday is constitutional); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1363-65 (11th Cir. 1999), *cert. denied,* 529 U.S. 1053 (2000)

(reviewing the hours of operation restrictions as a whole, the court upheld city's restriction that adult establishments could not open before noon every day and must close by 2 a.m.); *Dima Corporation v. Town of Hallie,* 185 F.3d 823 (7th Cir. 1999) (upheld ordinance specifying adult-oriented establishments may not be open between 2 a.m. and 8 a.m. Monday through Friday, between 3 a.m. and 8 a.m. on Saturday and between 3 a.m. and noon on Sunday); *Ben Rich Trading, Inc. v. City of Vineland,* 126 F.3d 155, 160-63 (3rd Cir. 1997) (upheld city ordinance prohibiting opening of sexually oriented business before 8 a.m. or after 10 p.m. Mondays through Saturdays or on any Sunday or legal holiday); *National Amusements v. Town of Dedham,* 43 F.3d 731 (1st Cir. 1995), *cert. denied,* 515 U.S. 1103 (1995) (upheld town by-law prohibiting licensed entertainment businesses (including traditional theater multiplex) from operating between 1 a.m. and 6 a.m. due to secondary effects); *Mitchell v. Com'n on Adult Entertainment Establishments,* 802 F. Supp. 1112 (D. Del. 1992), *aff'd,* 10 F.3d 123, 130-39 (3rd Cir. 1993) (upheld Delaware's requirement that adult establishments must close between 10 p.m. to 8 a.m., Monday through Saturday, and all day Sundays and holidays); *Star Satellite Inc. v. City of Biloxi,* 779 F.2d 1074, 1079-80 (5th Cir. 1986) (overturned preliminary injunction prohibiting enforcement of hours of operation restrictions identical to those contained in Chapter 421).

In contrast to the situation in *Alameda Books*, the Tennessee legislature did not principally rely upon its own study, but focused upon the experience of other jurisdictions regarding the validity of hours of operation restrictions. This Court has consistently held, as first expressed in *Renton,* 475 U.S. at 51-52, that "the First Amendment

does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to problem the city addresses." Cited with approval in *Alameda Books,* 535 U.S. at ___, 122 S.Ct. at 1736 (plurality opinion). The plurality in *Alameda Books* rejected the dissenters' requirement that the government "[i]n effect . . . demonstrate, not merely by appeal to common sense, but also with empirical data, that its [regulation] will successfully lower crime." *Alameda Books,* 535 U.S. at ___, 122 S.Ct. at 1736.

There can be no question the Tennessee legislature adopted Chapter 421 as a means of addressing commonly recognized deleterious secondary effects associated with certain types of adult-oriented establishments. As noted by the Sixth Circuit, the preamble of Chapter 421 specifically refers to land use studies and other experiences in other jurisdictions, as well as to the experience of the citizens and public officials within Tennessee, as providing convincing evidence of deleterious secondary effects of adult-oriented establishments, including increased crime, downgrading of property values, and the spread of sexually transmitted and communicable diseases. *Richland Bookmart I,* 137 F.3d at 437. The record shows that the sponsor and the other members of the legislature considered or had available to them studies (or their summaries), plus case law, from other jurisdictions documenting the existence of the deleterious secondary effects. R. 21, Show Cause Response, Exhibits, Vol. I, 112, 114 & Vol. II, 154-494.

The Tennessee legislature also specifically cited and relied upon the judicial experience of other jurisdictions,

where courts had upheld the same, or even more stringent, restrictions on hours of operations of adult-oriented establishments as a means of curbing secondary effects. *See* Chapter 421 preamble, 12th "Whereas" Clause, citing *Mitchell,* 10 F.3d 123 (3rd Cir. 1993) and *Star Satellite Co., Inc. v. City of Biloxi,* 779 F.2d 1074 (5th Cir. 1986). Although, as noted by petitioner, Chapter 421 was remanded to committee for further review of the preamble's "whereas" recitals, the legislature specifically received testimony regarding case law upholding hours of operation and open booth restrictions. *See, e.g.,* R. 21, Show Cause Response, Exhibits, Vol. I, 42-43, 49, 61-66, 70-73, 75-80, 120-23. As previously noted, circuit courts have universally upheld hours of operation restrictions in other jurisdictions.

Furthermore, the legislature reasonably relied upon judicial findings regarding experiences in Nashville and Chattanooga, Tennessee. *Ellwest Stereo Theater v. Boner,* 718 F. Supp. 1533, 1577 (M.D. Tenn. 1989) (upheld Nashville ordinance restricting hours of operation of adult-oriented establishments, finding that such restrictions are particularly "justified by the difficulty of policing and enforcing the ordinance in the wee hours of the morning"); *Broadway Books, Inc. v. Roberts,* 642 F. Supp. 486 (E.D. Tenn. 1986) (upholding hours of operation restrictions in Chattanooga adult-oriented establishment ordinance). These cases recited evidence that sex-related crimes, some committed by employees or entertainers at adult-oriented establishments, increase at or near adult-oriented establishments. Furthermore, these cases document that anonymous and public sexual activities occurring within adult arcades (wherein condoms, semen, blood, defecation, and urine are present) create a serious health hazard.

Ellwest Stereo Theater, Inc., 718 F. Supp. at 1562-64; *Broadway Books, Inc.*, 642 F. Supp. at 491.

The Tennessee legislature also received written and oral testimony, particularly regarding adult-oriented bookstores with viewing arcades in Memphis, Tennessee. Testimony illustrated the presence of fresh semen, urine, and feces, as well as blatant solicitations for anonymous and unhealthy sexual activity within viewing arcades. Testimony indicated that the Memphis establishments were generally open 24 hours a day, 365 days per year. The legislature understood that often prostitutes congregate at or near adult-oriented establishments. A business adjoining a Memphis adult bookstore had reported the need to sweep up used condoms and needles daily left behind by bookstore patrons who used the business parking lot late at night. *See, e.g.*, R. 21, Show Cause Response, Exhibits, Vol. I, 10-11, 13-18, 21-22, 125-27 & Vol. III, 495-98, 502-04, 508-09, 544-45. Testimony from medical professionals documented the health risks, including the increase in HIV and sexually transmitted diseases, that may be associated with the sexual activity and unhealthy conditions described as associated with adult-oriented establishments. *See, e.g.*, R. 21, Show Cause Response, Exhibits, Vol. III, 502-06, 510-17, 532-37, 541-43.

Chapter 421's preamble and legislative history, including an exhibit volume of studies and information from other jurisdictions regarding secondary effects, were presented to the district court as part of respondent's show cause response opposing a permanent injunction and were before the Sixth Circuit. R. 21. Petitioner did not present sufficient evidence to dispute the evidence upon which the legislature relied although it was afforded the opportunity

to do so. Moreover, petitioner never requested an opportunity from the district court or the Sixth Circuit to present further proof to dispute the government's rationale for Chapter 421. Therefore it is not appropriate to remand this case for the purpose of reopening the proof.

As this Court has acknowledged, legislative bodies are "in a better position than the Judiciary to gather and evaluate data on local problems." *Alameda Books,* 535 U.S. at ___, 122 S.Ct. at 1737; *citing Erie v. Pap's A.M.,* 529 U.S. 277, 297-98 (2000) (plurality opinion). Guided by the principle of *Renton* that "content neutral" regulations should receive only intermediate scrutiny, this Court's "cases require only that [governmental entities] rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address." *Alameda Books,* 535 U.S. at ___, 122 S.Ct. at 1737-38. In light of the preamble, legislative history, and information available to Tennessee's legislature in connection with the enactment of Chapter 421, the Sixth Circuit properly concluded that the legislature's selection of hours restrictions as a means of addressing secondary effects "is not unreasonable[.]" *Id.* at 441. It was reasonable for the legislature to conclude that the impact of the recognized deleterious secondary effects on the community from adult-oriented establishment is even greater during traditional non-work times, especially when family and community activities are conducted. *See Tee & Bee, Inc. v. City of West Allis,* 936 F. Supp. 1479, 1492 (E.D. Wis. 1996) (upholding hours of operation restrictions as furthering "articulated goals of preventing crime and preserving the quality of neighborhoods," the court noted that hours restrictions occur when crime is more likely, when law enforcement personnel are

more likely to be busy with other matters, and that "special precautions" may be warranted "during those times when people are generally sleeping and when peaceful enjoyment of the home is most important."). The decision below is thus fully consistent with the pertinent precedents of this Court and with the decisions of other courts of appeals addressing the constitutionality of similar hours of operation restrictions.

II. THE COURTS BELOW CORRECTLY FOUND THAT THE LIMITED EXCLUSION OF CERTAIN LIVE-ENTERTAINMENT ESTABLISHMENTS FROM THE HOURS OF OPERATION RESTRICTIONS WAS RATIONALLY RELATED TO A STEP-BY-STEP LEGISLATIVE REFORM EFFORT TO ADDRESS DELETERIOUS SECONDARY EFFECTS.

In *Richland Bookmart II*, the district court and the Sixth Circuit correctly determined that the limited exemption from Chapter 421's hours of operations restrictions is not unconstitutional under the Equal Protection Clause.[3] That conclusion was dictated by a straightforward application of this Court's prior decisions and does not warrant further review.

Under the Fourteenth Amendment, similarly situated persons should be treated equally. Statutes will withstand

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[3] The exemption in Section 6 of Chapter 421 [codified at Tenn. Code Ann. § 7-51-1405] from hours of operation restrictions is limited to certain adult-oriented establishments, offering "only live, stage adult entertainment in a theatre, adult cabaret, for dinner show type setting[.]"

equal protection scrutiny if they bear a rational relationship to a legitimate state interest, as long as they do not interfere with fundamental rights or single out suspect classifications. *City of Cleburne v. Cleburne Livings Ctr.*, 473 U.S. 432, 439-40 (1985). Obviously, adult bookstore owners are not a suspect classification entitled to heightened protection. Nor on this record can it be argued that the exemption is the product of invidious discriminatory animus against adult bookstore owners and in favor of live cabarets. *Richland Bookmart II*, 278 F.3d at 574-75.

This Court's "settled position [is] that [government] must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books*, 535 U.S. at ___, 122 S.Ct. at 1736 (plurality opinion), *citing Renton*, 475 U.S. at 52 (*quoting Young v. American Mini Theaters, Inc.*, 427 U.S. at 71 (plurality opinion)). In 1994, the Tennessee legislature adopted the Public Indecency Act, 1994 Tenn. Pub. Acts, Ch. 542 (codified at Tenn. Code Ann. § 39-13-511), to curb the deleterious secondary effects of public nudity, including that occurring at live adult-oriented cabarets and similar venues. The constitutionality of such a regulatory scheme, which in effect requires entertainers at such venues to wear, at a minimum, "pasties" and "g-strings," as a means of addressing deleterious secondary effects, has been sustained under this Court's decision in *Erie v. Pap's A.M.*, 529 U.S. at 296-302.[4] Thus, Tennessee has not

[4] In 1999, the Sixth Circuit upheld the constitutional validity of Tennessee's Public Indecency Act, in a lawsuit that was filed by owners and operators of multiple nude dancing establishments prior to the act's July 1994 effective date. *See Richland Bookmart II*, 278 F.3d at 573, *citing In re: Tennessee Public Indecency Statute*, Nos. 96-6512, 96-6573,

(Continued on following page)

singled out the secondary effects associated with adult bookstores for special restrictions while leaving unregulated those effects associated with live performance venues. Rather, the legislature has targeted the secondary effects caused by both forms of adult entertainment evenhandedly and comprehensively, but with a view towards ensuring that the restrictions imposed on each "be no greater than necessary to further the [State's] interest." *Erie v. Pap's A.M.*, 529 U.S. at 301. Although the legislature could have chosen to subject adult-oriented live performance venues to Chapter 421's hours restrictions, petitioner cites no authority for the proposition that it was required to do so. Moreover, there is no basis for assuming that the Tennessee legislature would not amend Chapter 421 in the future to include the exempted businesses if the Public Indecency Act proves ineffective in eliminating the deleterious secondary effects caused by adult-oriented live performance venues. *See generally Renton*, 475 U.S. at 50-54.

As the court of appeals correctly observed, "[t]he Tennessee legislature arrived at a plausible step-by-step approach to addressing" the deleterious secondary effects associated with both adult bookstores and live cabarets which "bears a rational relation to a legitimate governmental purpose." *Richland Bookmart II*, 278 F.3d at 578. Since the legislative scheme neither draws suspect classifications nor betrays any invidious discriminatory

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97-5924, 97-5938, 1999 WL 55276 (6th Cir. Jan. 13, 1999) (unpublished table decision).

intent, it fully comports with this Court's equal protection jurisprudence.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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